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IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioner,

v. **CASE NO.: SC22-1207**

MCMILLAN C. GOULD,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY JURISDICTION TO REVIEW A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

MR. GOULD'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

Mr. Gould received a 25 year prison sentence upon being convicted of an attempt to commit sexual battery. What is at stake in this case is whether he is eligible to be considered for incentive gain time, which, combined with other types of gain time for which Mr. Gould's eligibility is not at issue, at best could reduce his sentence to 21.25 years (85% of the imposed sentence).

The threshold issue to be decided is whether this court can exercise its discretionary jurisdiction to review a decision of the First District Court of Appeal that does not expressly and directly conflict with any decision of this court or any other Florida court of appeal on the same question of gain time law. The issue of Mr. Gould's eligibility for gain time needs only to be addressed if the court finds such an express and direct conflict.

If the court decides to reach the merits, the ultimate issue to be decided is whether the applicable exception in the gain time statute - which precludes eligibility for incentive gain time for anyone convicted of a violation of §794.011, the Florida sexual battery statute, applies to a person convicted of an attempt to commit a sexual battery[1/].

1/ The assertion that this case involves §800.04 (IB 9) is simply wrong.

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PRELIMINARY STATEMENT

In this brief the Petitioner, **FLORIDA DEPARTMENT OF CORRECTIONS**, will be referred to as "the Department." The Respondent, **MCMILLAN C. GOULD**, will be referred to as "Mr. Gould" or "Gould." The Department's initial brief on the merits will be referred to as "IB."

STATEMENT OF THE CASE AND FACTS

A. Legal Background

The Department's statement of the legal background of this case (IB 1-2) is inadequate because it provides an incomplete - and therefore misleading - recitation of the status of the law on this issue.

The gain time statute at issue is §944.275(4)(e), Florida Statutes. It precludes consideration to obtain incentive gain time for any Department inmate convicted of violating any of seven specific Florida statutes. Only one of those - §794.011 - is at issue in this case. The attempt statute, §777.04, Florida Statutes, is not one of the seven listed, and the words "attempt" or

"attempts" are not listed in §944.275(4)(e) either.

Section 794.011, which covers the offense of sexual battery, and which specifies several distinct ways in which a sexual battery can be committed, does not list an attempt to commit a sexual battery as a separate crime.

Given these statutes, all three district courts of appeal that have discussed gain time in connection with a conviction for attempt to commit sexual battery - the First (in Gould and 26 years earlier), Second, and Fifth Districts - have therefore agreed that such a defendant is eligible to be considered for gain time. The Department now seeks to overturn these rulings that have stood for over 26 years.

The Department's primary argument is that an attempted sexual battery must be considered a violation of the sexual battery statute. Over 65 years ago, and most recently in 2015, this court stated that an attempted murder is not a violation of the homicide statute, because the homicide statute only covers acts that result in death, and does not cover attempts. The same rationale must apply to this appeal, because the sexual battery statute only covers completed sexual batteries, and does not cover attempts.

B. Facts and Procedural History

For the most part, Mr. Gould accepts the Department's presentation of

the case history (IB 2-7). As for the procedural history, however, the Department misses a major point, which is that only part of Mr. Gould's initial gain time argument is at issue in this case.

The gain time statute - §944.275 - discusses three types of gain time that an inmate may receive: subsection (4)(a) discusses basic gain time, subsections (4)(b) and (4)(d) discuss incentive gain time, and subsection 4(c) discusses gain time for outstanding deeds. In his requests within the Department, Gould asserted he was eligible for gain time consideration. This was a broad request, and not limited to incentive gain time. At the classification and warden level, the Department responded that he was not eligible for any gain time, based on §944.275(4)(e), which only addresses ineligibility for incentive gain time (Record at 100-04, 111-14). At the Secretary of the Department level, the Department stated only that he was not eligible for incentive gain time (Record at 115-17).

In his complaint/petition for a writ of mandamus filed in the circuit court, Mr. Gould again argued he was eligible for gain time, and did not limit his petition only to incentive gain time (Record at 100-17). The Department's response only argued that Gould was not eligible for incentive gain time, and did not argue about any other type (Record at 118-46). The circuit court's

final judgment noted that §944.275(4)(e), post-2014, did not even address basic or good deed gain time, but only applied to incentive gain time (Record at 155). In overruling the Department's position as to incentive gain time, the circuit court ordered that " . . . the Department and Secretary may not deny Petitioner Gould's eligibility for gain time [whether basic, incentive, outstanding deed or other] automatically." (Record at 156). It further ruled that the Department must consider Gould as eligible for gain time for his past time in prison and going forward (Record at 156).

In its petition/appeal to the First District, the Department only argued that the circuit court erred as to incentive gain time (Record at 83-97). The First District therefore considered - and ruled upon - only the correctness of the circuit court's order on the issue of eligibility for incentive gain time consideration. Mr. Gould's eligibility for other gain time remains as ordered by the circuit court[2/]. Accordingly, the Department's arguments in this court only deal with the incentive gain time issue (IB I, 7-9).

Additionally, in its discussion of the decision in Wilcox v. State, 783

2/ This is one reason why this court's blanket stay of the circuit court's order was unjustified. No matter the result in this appeal, the circuit court's judgment as to Mr. Gould's eligibility for other types of gain time remains the law of this case, as that part of the judgment was never appealed.

So.2d 1150 (Fla. 1st DCA 2001)(en banc) (IB 4), the Department fails to mention that Wilcox did not discuss, much less decide, any issue related to gain time.

SUMMARY OF THE ARGUMENTS

I. THE GAIN TIME STATUTE DOES NOT PRECLUDE PERSONS CONVICTED OF ATTEMPTED SEXUAL BATTERY FROM CONSIDERATION FOR INCENTIVE GAIN TIME

Contrary to the Department's arguments, an attempt to commit a sexual battery is not "a violation of" the sexual battery statute, §794.011. A sexual battery is a violation of that statute, but an attempt is not included in the definition of the term "sexual battery." That statute punishes a completed sexual battery. Therefore the statute that precludes eligibility for incentive gain time to someone convicted of a violation of §794.011 does not preclude eligibility for someone convicted of an attempt to commit a sexual battery. Multiple courts of appeal have so held. The First District was correct in so ruling, and its decision must be affirmed.

II. PLAIN LANGUAGE OF INCENTIVE GAIN TIME STATUTE SHOWS ITS PURPOSE IS TO REWARD ELIGIBLE OFFENDERS WHO ACT PRODUCTIVELY IN PRISON

Incentive gain time is provided in an effort to give inmates who act productively while in prison a benefit - through the possibility of a reduced sentence - for that positive activity. The legislature has made a decision that only persons with life sentences, or mandatory day-for-day sentences, or those convicted of seven specific categories of offenses should be denied eligibility for incentive gain time. Treating attempts differently than substantive offenses - both in terms of maximum penalty and gain time eligibility - is a legislative purpose that is both longstanding and logical. The Department's attempts to have this court override that legislative prerogative must fail.

III. CASE MUST BE DISMISSED AS COURT LACKS JURISDICTION TO REVIEW IT

This court lacks jurisdiction to decide this case because the Department cannot show conflict "on the same question of law" - that of incentive gain time eligibility - decided by the First District in Gould. The First District's decision on the incentive gain time issue does not expressly and directly conflict with any decision the Departments cites.

ARGUMENTS

I. THE GAIN TIME STATUTE DOES NOT PRECLUDE PERSONS CONVICTED OF ATTEMPTED SEXUAL BATTERY FROM CONSIDERATION FOR INCENTIVE GAIN TIME

For anyone who claims to be a textualist these days, the texts of the statutes involved provide a clear answer to this court, as they have to each district court of appeal that has considered this issue. Mr. Gould agrees that this issue of statutory interpretation is reviewed de novo by this court.

That clear answer is this: §944.275(4)(e) of the gain time statute precludes consideration for incentive gain time if a person had been convicted of a crime in violation of §794.011, Florida Statutes, but it does not state that a person convicted of attempting to violate that statute is ineligible. Section 794.011 is entitled "Sexual battery" and specifies several ways a sexual battery can be committed. An attempt to commit one of those types of sexual batteries is not listed as a distinct sexual battery violation in §794.011.

That clear answer demonstrates that the Department's arguments that an attempted sexual battery is an offense in violation of §794.011 (IB 9-15), and that an attempted sexual battery is a sexual battery offense (IB 15-24),

must be rejected. As Gould stated

> . . . we can say without a doubt that when the Legislature states in section 944.275(4)(e) that incentive gain-time may not be given on a sentence imposed on an offense that "is a violation of" section 794.011, it means a sentence imposed for a completed offense defined in that provision.

344 So.3d at 509 (footnote omitted). "Common sense tells us that a perpetrator's failure to complete the crime defined means that he has not violated the statute defining it . . .." Id.

A. Existing Precedent on this Issue is Unanimous

In four cases, the three district courts of appeal that have actually written on the issue of eligibility for gain time consideration for a person convicted of an attempt to commit a sexual battery have stated that such a defendant is eligible to be considered. In its merits brief, the Department only discusses Gould, and does not even tell this court about the other three, and certainly not about the one from the Fifth District. To do so would have undercut its arguments that the First District should be seen as an outlier on this issue and that Gould conflicts with cases from the Fifth District on the same issue of law.

The First District so held over 26 years ago in Zopf v. Singletary, 686

So.2d 680 (Fla. 1st DCA 1996)[3/]. What it stated then is equally applicable now.

> After examining section 794.011(7), Florida Statutes (1993), we have concluded that the language referring to "[a] person convicted of committing a sexual battery" is "clear and not entirely unreasonable or illogical in its operation," so that we lack the "power to go outside the statute in search of excuses to give a different meaning to words used in the statute." . . . If the legislature had intended for the provisions of that subsection to apply also to those persons, like the appellant, who were convicted of *attempted* sexual battery, then it would have been a simple matter to state it plainly in the statute. Where a statute specifically enumerates those persons to be covered, ordinarily the statute will be construed as excluding from its operation all other persons not expressly mentioned. . . . Unless and until the legislature elects to amend subsection (7) so as to include those persons convicted of attempted sexual battery, we cannot as a matter of law impose upon that statute the particular meaning suggested by the Department. . . .

Id. at 681-82 (citations omitted; italics in original). The court also noted that this court stated in State v. Llopis, 257 So.2d 17, 18 (Fla. 1971), that "[P]enal statutes are to be strictly construed *in favor of the person against whom the penalty is sought to be imposed*." Id. at 683 (italics in original).

3/ In Gould the First District receded from some language in Zopf dealing with the Florida attempt statute, but it did not overturn its holding on the gain time issue. 344 So.3d at 499, 506-07.

Of course, the First District held again in Gould that because attempted sexual battery is not mentioned in the current incentive gain time or sexual battery statutes, a person so convicted remains eligible to be considered for incentive gain time.

The Second District, citing Zopf, stated in Clark v. State, 855 So.2d 691, 693 (Fla. 2d DCA 2003) that "Clark could have been eligible for basic gain time on a conviction for *attempted* sexual battery" (italics in original). It has never said otherwise since.

The Department based its jurisdictional argument on cases from the Fifth District that did not even discuss gain time, as discussed in Argument III below. In the one Fifth District case that did discuss this issue, McArthur v. State, 730 So.2d 333 (Fla. 5th DCA 1999), the court stated:

> The legislature has decided that persons convicted of completed acts of sexual battery are not entitled to gain time while those convicted only of an attempt do not lose gain time. Zopf v. Singletary, 686 So.2d 690 (Fla. 1st DCA 1996)(if the legislature had meant section 794.011(7) to include those who are convicted of attempted sexual battery, legislature would have so stated).

The Fifth District has never said otherwise since, despite the Department's efforts to align the Fifth District with its theory in this appeal.

B. Statutes Involved

This case involves the interpretation of three Florida Statutes: the exception to incentive gain time statute, the attempt statute, and the sexual battery statute. As this issue concerns the meaning of statutes, this court's determination of the issue must begin with the language of the applicable statutes. The court will also consider the specific context in which the language is used, and the broader context of the statute as a whole. Conage v. United States, 346 So.3d 594, 598 (Fla. 2022). In this case, the language of the applicable statutes is plain and clear, and the applicable context supports only one conclusion. The Department's efforts to go beyond the language and context must be rejected.

1. Gain Time

Section 944.275(1), Florida Statutes, authorizes the Department to grant deductions from a prison sentence in the form of gain-time. There are three listed types of gain time. §944.275(4)(a)-(d). At issue in this appeal is §944.275(4)(e), which states in its entirety:

> Notwithstanding subparagraph (b)3., for sentences imposed for offenses committed on or after October 1, 2014, the department may not grant incentive gain-time if the offense is a violation of s. 782.04(1)(a)2.c.; s. 787.01(3)(a)2. or 3.; s. 787.02(3)(a)2. or 3.; s. 794.011, excluding s. 794.011(10); s. 800.04; 825.1025; or s.

847.0135(5).

This exception only covers incentive gain time, and not the other two types. There is no dispute that Mr. Gould's offense was committed on or after October 1, 2014.

2. Attempt

Section 777.04(1), Florida Statutes**,** states in its entirety:

> A person who attempts to commit an offense prohibited by law and in such attempt does any act toward the commission of such offense, but fails in the perpetration or is intercepted or prevented in the execution thereof commits the offense of criminal attempt, ranked for purposes of sentencing as provided in subsection (4). Criminal attempt includes the act of an adult who, with intent to commit an offense prohibited by law, allures, seduces, coaxes, or induces a child under the age of 12 to engage in an offense prohibited by law.

Section 777.04(4)(a), Florida Statues, states in pertinent part:

> Except, as otherwise provided in ss. 104.091(2), 379.2431(1), 828.125(2), 849.25(4), 893.135(5), and 921.0022, the offense of criminal attempt . . . is ranked for purposes of sentencing under chapter 921 and determining gain-time eligibility under chapter 944 one level below the ranking under s. 921.0022 or s. 921.0023 of the offense attempted . . ..

Section 777.04(4)(b), Florida Statutes, states in pertinent part: "If the offense attempted . . . is a capital felony, the offense of criminal attempt is a

felony of the first degree . . .."

Thus the Florida attempt statute, on its face, treats attempts differently from the substantive offenses for both sentencing purposes and for gain time eligibility.

3. Sexual Battery

Section 794.011, Florida Statutes - entitled "Sexual battery" - is a lengthy statute that sets forth definitions, offenses, and penalties for a person in charged under that statute.

Of primary importance is §794.011(1)(h), which states

> "Sexual battery" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however sexual battery does not include an act done for a bona fide medical purpose.

Thus §794.011, the statute listed in §944.275(4)(e), does not include an attempt in its definition of what constitutes a sexual battery. This definition only includes completed offenses.

There are a number of ways to violate the sexual battery statute, and those are found in subsections (2) through (5). The subsection referred to in Mr. Gould's judgment is subsection (2)(a). In pertinent part it says

> A person 18 years of age or older who commits sexual battery upon . . . a person less than 12 years of age commits a capital felony . . ..[4/]

Section 794.011(7) states in its entirety:

> A person who is convicted of committing a sexual battery on or after October 1, 1992, is not eligible for basic gain-time under s. 944.275. This subsection may be cited as the "Junny Rios-Martinez, Jr. Act of 1992."

Although this subsection does not mention incentive gain time, it is important because on its face it does not exclude persons convicted of attempts from being considered for basic gain time. Zopf v. Singletary, 686 So.2d 680 (Fla. 1st DCA 1996).

C. Statutes Do Not Preclude Gain Time Consideration for an Attempted Sexual Battery

On its face §944.275(4)(e), mentions only §794.011 - the sexual battery statute - and nowhere mentions §777.04(1) - the attempt statute. On its face, §794.011 does not specify an attempted sexual battery as constituting a violation. Despite that the Department asks this court to ignore the plain

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4/ Subsection (2)(a) contains an alternative method of violation, to wit: "A person 18 years of age or older who . . . in an attempt to commit sexual battery injures the sexual organs of , a person less than 12 years of age . . ." commits a capital sexual battery. Mr. Gould was not charged or convicted under that theory.

language of the statutes and rule that §944.275(4)(e) really covers attempts also. That would be a grave injustice.

The Department tries to get around the plain language by asserting that the phrase "in violation of" in §944.275(4)(e) is a term of art. That claim must be rejected. "In violation of" is a common phrase in criminal law. It has a very straightforward meaning. A person is "in violation of" a statute if he or she actually violated it, i.e., if he or she committed an act which that specific statute prohibited.

The Department's laundry list of cases which discussed an attempted sexual battery in terms of both §777.04(1) and §794.011 does not include any case which held that a person convicted of attempted sexual battery actually committed a sexual battery. Only someone who commits a sexual battery can be held to be in violation of §794.011. See Gridine v. State, 175 So.3d 672 (Fla. 2015)(a person who commits an attempted murder has not violated the murder statute).

D. The Legislature Knows How to Include Attempts When It Wants To

The Department wants this court to assume that the legislature meant to include attempts in the incentive gain time statutory exclusion, even though the statute does not say so, and therefore this court should just read that word

into the statute. But even a cursory review of Florida criminal statutes, Florida sentencing statutes, and Florida sexual offender statutes makes it clear that the Florida legislature knows how to include attempts in any given statute if it deems that inclusion appropriate. Some of those instances are set forth here.

1. Career Criminal Prosecutions

Section 775.084 includes attempts in those crimes that can qualify a person to be a violent career criminal, a habitual felony offender, a habitual violent felony offender, or a three-time violent felony offender.

Section 775.0842, Florida Statutes, includes persons charged with attempts to commit a felony to be prosecuted under career criminal statues if the person qualifies for such consideration.

2. Persons Possessing or Using Weapons

Section 775.087, Florida Statutes, includes the attempt to possess or use a weapon in connection with the enumerated offenses to both reclassify the level of the offense and to impose an increased penalty.

3. Sexual Predators

Section 775.21, Florida Statutes, specifically defines a person who is convicted of an attempt to commit a number of specified offenses as a sexual

predator. §775.21(4)(a)1.b. Johnson v. State, 716 So.2d 332 (Fla. 2d DCA 1998)(sexual predator statute specifically covered attempted sexual battery convictions).

4. Sexual Offenders

Section 943.0435, Florida Statutes, specifically defines a person who is convicted of an attempt to commit a number of specified offenses as a sexual offender. §943.0435(1)(h)a.(I), (II).c., d.

What these examples make clear is that the legislature includes attempts when it want to include attempts[5/]. These are all situations involving serious criminal offenders, and the legislature certainly knows that it can

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5/ On this point, it should be noted that there are pending in the current Florida legislative session nearly identical House and Senate bills which would eliminate eligibility for basic and incentive gain time for offenders who violate the seven statutes in the current gain time statute, and also make anyone convicted of attempting, soliciting, or conspiring to commit those statutes ineligible. If passed, the attempt exclusion would apply to offenses committed on or after July 1, 2023. See Florida House Bill 537 (2023); Florida Senate Bill 528 (2023); Florida Senate Bill 528 (2023), Bill Analysis and Fiscal Statement.

The existence of these bills, and the push to pass them now, show the legislature's understanding that the current statutes do not make a person convicted of an attempt ineligible to be considered for incentive gain time, contrary to the Department's arguments in this appeal. Again, the bills also demonstrate that the legislature knows how to add attempts to statutes when it wants to.

include coverage for attempts when it deems that appropriate. But in the end the decision to include attempts is a policy decision for the legislature, one which this court must honor.

E. An Attempt is a Violation of §777.04(1) and Not a Violation of the Subject Statute Alleged

As the First District ruled, in Florida the crime of attempt is a separate and distinct crime from the substantive offense linked to that attempt[6/]. Section 777.04 repeatedly refers to "the offense of criminal attempt" as a separate and distinct crime from any other. Section 777.04(1) sets forth the stand alone crime of attempt as a violation of that statute, and of no other. The crime of attempt has its own jury instruction. Offense Instruction 5.1, Florida Standard Jury Instructions in Criminal Cases. That instruction sets forth the only two essential elements that the state must prove beyond a reasonable doubt. While this instruction provides that the jury is given the elements of the offense that is the subject of the attempt, those elements are not part of what the state must prove for an attempt conviction. The statute

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6/ Attempt is not the only inchoate crime held to be separate and distinct from its subject offense. Conspiracy is set forth as a crime in §777.04(3), Florida Statutes. "[T]he crime of conspiracy is a separate and distinct crime from the offense that is the subject of the conspiracy." Kocol v. State, 546 So.2d 1159, 1160 (Fla. 5th DCA 1989).

has its own penalty section in §777.04(4). It has its own specialized defenses in §777.04(5). While the offense that is the subject of the attempt must be made known to the defendant to satisfy basic notice requirements, and to advise the defendant and the court as to the applicable penalties should a conviction occur, an attempt does not punish an actual violation of the subject offense, only that of §777.04(1).

From this one can see, as the First District did, that a criminal attempt under §777.04(1) is a separate and distinct offense from the offense attempted. Gould, 344 So.3d at 507-10.

F. An Attempted Sexual Battery is Not a Violation of the Sexual Battery Statute.

The Department's assertion that an attempted sexual battery is a violation of §794.011 (IB 15-24) must be rejected for several reasons.

The most obvious reason is the statute itself. As shown above, an attempt is not included in the definition of a sexual battery. In the subsections of §794.011 that specify criminal offenses - subsections (2) through (5) - none state that an attempt to commit a sexual battery is by itself a crime of sexual battery. No amount of obfuscation can change the plain language of that statute and make an attempt a violation of one of its provisions.

In this regard, this court's treatment of another serious offense -

homicide - is important. In Gridine v. State, 175 So.3d 672 (Fla. 2015), the defendant was convicted of attempted first degree murder, among other crimes. The state argued that attempted first degree murder should be construed as a homicide offense. The court unanimously disagreed, reaching back to its decision in Tipton v. State, 97 So.2d 277, 281 (Fla. 1957), where it stated "[U]nder the Florida homicide statute . . . it is necessary for the act to result in the death of a human being under the definition of homicide."[7/]

This is important because the same rationale must be applied to Mr. Gould's case to reject the Department's argument. Just as the definition of homicide does not include an attempt, the definition of sexual battery in §794.011(1)(h) does not include an attempt to do any of the listed things. The definition requires a completed act. Just as none of the homicide statutes - §§782.04, 782.07, 782.071, 782.072, 782.09, Florida Statutes - include an attempt to murder, so too none of the substantive sexual battery offenses - §794.011(2)-(5) - include an attempt to commit a sexual battery as a method

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7/ The Gridine court also cited Manuel v. State, 48 So.3d 94, 97 (Fla. 2d DCA 2010)("[S]imple logic dictates that attempted murder is a nonhomicide offense because death, by definition, has not occurred."). See also McCullum v. State, 60 So.3d 502 (Fla. 1st DCA 2011)(attempted second degree murder is not a homicide offense).

of committing a sexual battery[8/].

As the First District stated in Gould, the Department's reliance on Coicou v. State, 39 So.3d 237 (Fla. 2010), and Weatherspoon v. State, 214 So.3d 578 (Fla 2017) (IB 18-22), is misplaced. Both of these cases involve persons convicted of attempted first degree murder. Neither involved the issue discussed above in Tipton and Gridine, much less changed the court's opinion on that point. So Gridine is still the controlling law on the point that an attempted murder is not a violation of the murder statute.

Coicou involved the issue of whether attempted second degree murder was a lesser included offense of attempted first degree felony murder, and that was the only issue the court decided. In that case the court never said that a conviction of attempted murder was a conviction under the homicide state.

In Weatherspoon, issued after Gridine, again the court never said that a conviction of attempted murder was a conviction under the homicide statute,

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8/ In a similar situation, the United States Court of Appeals for the Eleventh Circuit recently held that a conviction for conspiracy to possess a controlled substance was not a controlled substance offense because the definition of "controlled substance offense" did not include inchoate offenses like conspiracy and attempt. United States v. Dupree, ___ F.4th ___ (11th Cir. 1/18/2023)[Case Number 19-13776).

or even discussed that issue. That case involved the issue of whether the state was entitled to a jury instruction on attempted felony murder when the information only alleged attempted premeditated murder, and that was the only issue the court decided.

* * *

For all of these reasons the decision of the First District must be affirmed. It correctly concluded that the language in the incentive gain time exclusion does not apply to an attempt to commit a violation of §794.011..

II. PLAIN LANGUAGE OF INCENTIVE GAIN TIME STATUTE SHOWS ITS PURPOSE IS TO REWARD ELIGIBLE OFFENDERS WHO ACT PRODUCTIVELY IN PRISON

The Department misconstrues both the purpose and the plain language of the gain time statute when it claims

> Nothing suggests the Legislature wanted to exclude defendants convicted of attempting those sexual offenses from those increased punishments, including the prohibition on incentive gain time – which can decrease an inmate's sentence by up to 15 percent. (IB 24-25).

First, as argued in detail in Argument I above, the plain language of the incentive gain time exclusion does not include attempts or violations of

§777.04(1), while it does include seven other specific criminal statutes. As discussed above, the legislature knows very well how to include attempts in criminal statutes. The absence of attempts in the gain time statute absolutely means that the legislature intended to exclude attempts from the gain time prohibitions. The attempt statute itself demonstrates the legislature's general policy of treating attempts differently - and less severely - from substantive criminal offenses. The gain time statute is simply another example of that overriding legislative policy.

It is somewhat surprising that the Department wants to acknowledge that the statutory treatment of attempts with lesser penalties as being a valid legislative incentive, but does not give the legislative treatment of gain time incentives for attempts the same degree of acceptance (IB 28-29). The Department may not like it, and it is obviously determined to do something about it with the current legislative push, but it is up to the legislature to make such policy decisions for this state.

The Department's argument also goes against the underlying policy behind incentive gain time. For prisoners who are not serving mandatory life, or mandatory day-for-day sentences, incentive gain time is the Department's carrot that tells an inmate if you act productively in prison, you will be

considered for incentive gain time which can reduce your stay in prison. Its stated purpose has a decidedly positive goal: to provide an incentive to participate in productive activities §944.275(1), (4)(b), (d), Florida Statutes. This behavior benefits the Department, as more productive activity in the prisons is clearly a primary Department goal and desire. Incentive gain time thus clearly works in the Department's favor to advance basic behavioral goals[9/].

By making some, but not most, offenses eligible for incentive gain time the legislature made a policy determination that some offenders are to be treated differently than others, based upon the criminal conduct involved. There is both a rational and long-standing legislative policy, shown best in §777.04(4), to punish attempts - even attempts for sexual offenses - less seriously than completed crimes, both in terms of a maximum sentence and gain time consideration in prison.

As the Department surely understands, incentive gain time is not a get

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9/ It would also arguably benefit the Department (and taxpayers) by not having to keep inmates in prison for the full term who have demonstrated over time that they can obey the Department's dictates and be productive in prison. If someone has done that for 21.25 years and earned enough gain time for release at that point from a 25 year sentence, keeping him or her an additional 3.75 years is a great, and seemingly unnecessary, cost to the Department and thus taxpayers.

out of jail free card. Florida law mandates service of 85% of a sentence, regardless of how much gain time - incentive or otherwise - a person receives. Earned gain time can be lost for many reasons, such an disciplinary actions in prison, violations of probation, community control, or controlled release under §948.06(7), Florida Statutes, or vexatious litigation. Rest assured that every eligible inmate understands that serving 85% is better than serving 100%, and it is the stated purpose/incentive behind this statute to have those people work to achieve the earlier release.

In an attempt to get the court to ignore the statute, the Department tries to get the court to rule based on emotion, by arguing that an affirmance will result in many inmates being eligible for incentive gain time (IB 25). Yet, just as in Mr. Gould's own case, being eligible does not mean the person is getting 15% off of his or her sentence. Also, some attempted sexual offenders will have relatively low sentences, already not having been deemed much of a risk by the trial judge, and so not much prison time will be involved. Thus the number the Department throws out does not tell what the true effect of treating persons convicted of attempted sexual battery as the statutes requires, i.e., as eligible for incentive gain time, actually is.

To add to its appeal to emotion, the Department sets forth a recidivism

argument (IB 25-26). But those "sex offender" numbers do not differentiate between persons convicted of sexual offenses and those convicted of attempts. They lump all offenders together, something that the Florida legislature does not do. Like the rest of the Department's arguments in this appeal, this one is simply an effort to get this court to treat all sex offenders equally in all respects. But that cannot occur in this case, as the legislature has chosen not to treat someone convicted of attempting a sexual offense the same as someone convicted of a substantive sexual offense when it comes to a sentence or incentive gain time.

The Department's effort to discuss sexual offender probation (IB 27) is another attempt to ignore the sole issue in this appeal by throwing more stuff against the wall and hoping something sticks. This case has nothing whatsoever to do with sexual offender probation.

The purpose behind the gain time statute - and its specific exclusion - can be seen in the precise language of the gain time statute, and all of the Department's efforts to find some other basis to decide this case must be rejected. The legislature's decision on this point must be honored.

III. CASE MUST BE DISMISSED AS COURT LACKS JURISDICTION TO REVIEW IT

The jurisdiction of this Court is limited to a narrow class of cases enumerated in the Florida Constitution. Among the classes of cases that may, in the Court's discretion, be reviewed are those where it is alleged that a district court's opinion "expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." Article V, §3(b)(3), Florida Constitution.

The cases from this Court make clear that the express and direct conflict "on the same question of law" must appear on the face of the opinion - the face of the majority opinion and not a dissent - which the Court is being requested to review. Reaves v. State, 485 So.2d 829, 830 (Fla. 1986).

The First District's decision in Florida Department of Corrections v. Gould, 344 So.3d 496 (Fla. 1st DCA 2022)(en banc), is in accord with Florida law on the eligibility of a prison inmate for gain time consideration, as discussed above. There is nothing new or novel about the gain time law it applied. There is simply no basis to find that Gould does expressly and directly conflict with any decision cited by the Department on the same question of gain time law.

In considering the jurisdictional issue, the court must note that each of

the district courts of appeal that has actually written on the issue of eligibility for gain time consideration for a person convicted of an attempt to commit a sexual battery has stated that such a defendant is eligible to be considered. The First District so held in Zopf v. Singletary, 686 So.2d 680, 681-82 (Fla. 1st DCA 1996)(the gain time statutory language of "[a] person convicted of committing a sexual battery" does not apply to a person convicted of committing an attempted sexual battery). Of course, it again so held in Gould in 2022.

The Second District, citing Zopf, stated in Clark v. State, 855 So.2d 691, 693 (Fla. 2d DCA 2003) that "Clark could have been eligible for basic gain time on a conviction for *attempted* sexual battery" (italics in original). It has never said otherwise since.

The Department based its jurisdictional argument on cases from the Fifth District that did not even discuss gain time, as discussed below. In its one case that did discuss this issue, in McArthur v. State, 730 So.2d 333 (Fla. 5th DCA 1999), the court stated:

> The legislature has decided that persons convicted of completed acts of sexual battery are not entitled to gain time while those convicted only of an attempt do not lose gain time. Zopf v. Singletary, 686 So.2d 690 (Fla. 1st DCA 1996)(if the legislature had meant section 794.011(7) to include those who are convicted

> of attempted sexual battery, legislature would have so stated).

The Fifth District has never said otherwise since, despite the Department's misguided efforts to align the Fifth District with its theory in this appeal.

While not acknowledging Zopf, Clark, or McArthur at all in its initial brief, the Department has chosen to discuss several other decision that do not address any gain time issue. It relies on the six sentence decision from the First District in Wilcox v. State, 783 So.2d 1150 (Fla. 1st DCA 2001)(en banc). Wilcox - unlike Gould - did not discuss or decide any gain time issue. It is not the First District decision under review and simply cannot serve as a basis to create a conflict.

So in the end the Department is left with three cases from the Fifth District Court of Appeal cited by the Gould dissenters (and not discussed in the Gould majority opinion): State v. Thurman, 791 So.2d 1228 (Fla. 5th DCA 2001); Donovan v. State, 821 So.2d 1099 (Fla. 5th DCA 2002); State v. Fureman, 161 So.3d 403 (Fla. 5th DCA 2014)(IB 14). The obvious problem with the Department's argument is that **none of these three Fifth District cases cited by the Department even mentions the term gain time or the gain time statute, must less decides a question of law that involved gain time or the gain time statute.** Thus none of these three cases involve the

same question of law as in Gould. Gould held that Mr. Gould must be considered as eligible by the Department of Corrections for incentive gain time because he was convicted of attempted sexual battery, and not sexual battery as required by the incentive gain time statute. The Department was not a party to any of the three Fifth District decisions. None of the three considered a question of gain time at all; indeed none even mention those words. Each considered a question of law related to sex offender probation, a question of law obviously not discussed or decided in Gould. That these decisions contain dicta discussing attempted sexual battery offenses cannot obscure the fact that none of them decided the same ultimate question of law as Gould did. Thirteen members of the First District recognized this when they denied the Department's motion to certify conflict with these three cases. Gould, 344 So.3d at 520-24. See also State v. Lovelace, 928 So.2d 1176, 1177 (Fla. 2006)(cases addressing two distinct situations with different factual circumstances do not provide basis for jurisdiction).

The Department filed a notice to invoke jurisdiction in which it asserted the constitutional basis for review in this case was a conflict of decisions. Seeing the weakness of that argument, the Department in this case asked this court to essentially ignore the constitutional bases for review. It asked

this court to ignore the constitutional bases of jurisdiction and simply accept the case for review " . . . because this case is exceptionally important and because the decision below is wrong" (Department's Brief on Jurisdiction at 10-13). In essence these are its arguments in its initial brief. Yet neither of those reasons can provide this court with a constitutional basis to review this case. These arguments seek to have the court ignore fundamental law and accept the case on emotion and despite the lack of conflict. Such an argument would allow the court to accept virtually any case it chose to review, untethered to any constitutional basis for jurisdiction. This must not even be considered by the court.

The bottom line is that the Department cannot show that the First District's decision in Gould expressly and directly conflicts with any decision - not one - from this court or a district court of appeal on the same question of incentive gain time law. The Court must therefore ultimately decline to accept jurisdiction in this case.

CONCLUSION

For years the Department has been denying inmates convicted of attempted sexual battery all types of gain time, based solely on a statute that only contains an exclusion for one type of gain time, that of incentive gain time. And even that denial has been improper, as for over 26 years the appeal courts of this state have said that a person who is convicted of attempted sexual battery is eligible for gain time consideration. The Department's decision to ignore those rulings for decades is indefensible.

Based on the arguments and authorities set forth in this brief, this Court must dismiss this case as improvidently granted as the First District Court of Appeal's decision does not expressly and directly conflict with any decision from the Fifth District Court of Appeal on the same question of law. If it decides to reach the merits, it must affirm the decision of the First District. That court correctly determined that because the incentive gain time exception in the statute in question applies to sexual battery cases, but does not mention attempted sexual battery cases, Mr. Gould does not fall within its ambit.

Respectfully submitted this 10th day of April, 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this brief was efiled and that system sent a true copy by email address christopher.baum@myfloridalegal.com to counsel for the Petitioner: Christopher J. Baum, Senior Deputy Solicitor General, 1 S. E. 3rd Avenue, Suite 900, Miami, FL 33131-1706, on April 10, 2023. A true copy is also being sent by U. S. Mail to McMillan C. Gould, DC# C11267, Lancaster Correctional Institution, 3449 S. W. State Road 26, Trenton, FL 32693-5641.

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.045(b) and 9.210(a)(2)(B) I hereby certify that this brief is typed in Arial 14-point font and does not exceed 13,000 words.

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