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SC22-1207

In the Supreme Court of Florida

FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,
v.
MCMILLAN C. GOULD,
Respondent.

PETITIONER'S AMENDED APPENDIX TO JURISDICTIONAL BRIEF

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 1D19-1149

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First District Court of Appeal
State of Florida

No. 1D19-1149

Florida Department of Corrections,

Appellant,

v.

McMillan C. Gould,

Appellee.

On appeal from the Circuit Court for Leon County.
Karen A. Gievers, Judge.

June 10, 2022

On Hearing En Banc

Tanenbaum, J.

The Department of Corrections asks us to review a trial court order granting a writ of mandamus that would require the department to consider McMillan Gould for incentive gain-time. Gould is in prison on a conviction for attempted sexual battery. According to the department, the trial court erred in granting the writ because the operative gain-time statute excludes from eligibility those convicted of violating the statute defining sexual battery as a crime. The department contends this exclusion applies to those convicted of *attempting* a violation of that statute. Even though the department has sought review through certiorari, the

trial court did not issue the writ in its review capacity, so we treat this case as a direct appeal. Still, we disagree with the department's statutory interpretation and affirm the order granting mandamus. In the course of doing so, we recede from this court's previous pronouncement of a plainly incorrect legal principle regarding Florida's general criminal attempt statute, which first appeared in *Zopf v. Singletary,* 686 So. 2d 680 (Fla. 1st DCA 1996), and was later adopted in *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001).[1]

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[1] In both cases, this court stated that the criminal attempt statute effectively modifies whichever statute defines the offense attempted. *See Wilcox*, 783 So. 2d at 1150–51*; Zopf*, 686 So. 2d at 681. In *Wilcox* this court held this principle to mean that someone convicted of criminal attempt has violated the underlying offense statute, "as modified." 783 So. 2d at 1150–51. We disavow both the general principle and its application in *Wilcox* because they run counter to the unambiguous text of the criminal attempt statute, as we will explain.

We also state up front that even though *Wilcox* and *Zopf* involved statutory construction, it is not too late to correct our error. *See State v. Gray*, 654 So. 2d 552, 554 (Fla. 1995) ("Perpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." (quoting *Smith v. Dep't of Ins.,* 507 So. 2d 1080, 1096 (Fla.1987) (Ehrlich, J., concurring in part, dissenting in part))); *cf. Gamble v. United States*, 139 S. Ct. 1960, 1985 (2019) (Thomas, J., concurring) (explaining that when interpreting a statute, "[i]f a prior decision demonstrably erred in interpreting such a law," judges should "correct the error" rather than "perpetuate a usurpation of the legislative power"); *Johnson v. Transp. Agency, Santa Clara Cnty., Cal.*, 480 U.S. 616, 671 (1987) (Scalia, J., dissenting) (rejecting the assumption that a legislature approves by acquiescence a judicial construction of a statute when it does not amend the statute because the assumption is based on the "patently false premise that the correctness of statutory construction is to be measured by what the current [legislature] desires, rather than by what the law as enacted meant")).

I.

Gould pleaded no contest to attempted sexual battery on a child under the age of twelve. The conviction was not based on an attempt that resulted in injury to the child's sex organs.[2] The conviction instead was for "criminal attempt," which is defined in section 777.04, Florida Statutes (2014). Gould's judgment of conviction references both this statute and the sexual battery statute, section 794.011(2)(a), Florida Statutes (2014). He committed the crime sometime after October 1, 2014. The trial court sentenced him to twenty-five years in prison.[3]

Most prisoners are entitled to be considered for a grant of incentive gain-time by the department. *See* § 944.275(4)(b)3., Fla. Stat. (2014) (allowing the department to "grant up to 10 days per month of incentive gain-time" on sentences imposed for offenses committed after October 1, 1995). Incentive gain-time is the sum of "deductions from sentences . . . in order to encourage satisfactory prisoner behavior, to provide incentive for prisoners to participate in productive activities, and to reward prisoners who perform outstanding deeds or services." § 944.275(1), Fla. Stat.; *see also id.* (4)(b) (allowing for a monthly grant of incentive gain-time to an inmate who "works diligently, participates in training, uses time constructively, or otherwise engages in positive activities").

The department advised Gould he is not eligible for incentive gain-time, citing section 944.275(4)(e), Florida Statutes. Paragraph (4)(e) provides that for sentences imposed on offenses committed on or after October 1, 2014, the department "may not grant incentive gain-time if the offense is a violation of . . . s. 794.011," which defines "sexual battery" as a felony. The department considers Gould to be serving a sentence imposed for an offense that fits within this provision. Based on that reading,

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[2] Sexual battery on a child under twelve is a capital felony. § 794.011(2)(a), Fla. Stat. Under the same provision, "an attempt to commit sexual battery" that "injures the sexual organs of" a child under twelve also is a capital felony.

[3] The criminal attempt for which Gould was convicted is a first-degree felony. *See* § 777.04(4)(b), Fla. Stat. (2014).

the department will continue to exclude Gould, for the duration of this incarceration, from any consideration at all for a monthly gain-time credit against his sentence term.

Gould sued the department in circuit court for a writ of mandamus. He sought to compel the department to *consider* him as eligible for incentive gain-time, both retrospectively and for the remainder of his sentence. Primarily in reliance on this court's decision in *Zopf*, Gould averred that the department was "wrong" to declare him ineligible because he was convicted of the offense of criminal attempt to commit sexual battery, not the offense of sexual battery itself.

In *Zopf* the prisoner, who was convicted of attempted sexual battery, appealed the denial of his request for mandamus compelling the department to consider him for basic gain-time. A provision had been added to the sexual battery statute itself (section 794.011(7), Florida Statutes) that rendered a prisoner "convicted of committing a sexual battery . . . not eligible for basic gain-time."[4] Even in that case, the department took the position that the prisoner was ineligible under that provision because he had been convicted of an offense under the sexual battery statute. In denying relief, the trial court reasoned that "the obvious legislative intent of section 794.011(7) [was to prevent] the early release of sexual offenders under that statute." *Zopf*, 686 So. 2d at 681. Even though this court characterized "*attempted* sexual battery [as] a crime under section 794.011(2), Florida Statutes, as modified by the 'attempt' statute, section 777.04, Florida Statutes," it reversed, stating that "[i]f the legislature had intended for the provisions of [subsection seven] 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." *Id.* The court held that the department "may not rely on subsection (7) to deny Zopf's eligibility automatically." *Id.* at 682.

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[4] This provision, added directly to the sexual battery statute, is known as the Junny Rios-Martinez, Jr. Act of 1992.

In the proceeding below, the department responded to the trial court's show cause order[5] and attempted to distinguish *Zopf*. The department pointed out that the statutory provision it relied on in automatically denying Gould eligibility, section 944.275(4)(e), is not the same as the provision under consideration in *Zopf*. It argued that subsection (4)(e) "does not explicitly name any offense; rather, it refers to particular statutory sections and subsections." As the department put it, the "scope [of the subsection] is therefore broader, because anyone who is convicted of an attempt to commit a crime is never convicted *solely* under the attempt statute (Section 777.04(1)); rather, he is convicted under a particular criminal statute *as modified by* the attempt statute." This language came from our en banc decision in *Wilcox*. There, albeit in a different statutory context, this court held that the attempt statute, section 777.04(1), effectively modifies the sexual battery statute, section 794.011(2), such that a conviction for the offense of criminal attempt to commit sexual battery "is an offense under chapter 794, Florida Statutes." *Id.* at 1150.

The trial court agreed with Gould and rejected the department's reliance on *Wilcox*, reading this court's reference to *Zopf* as indicative of the latter decision "still being good law." The court granted Gould the relief he sought: a writ that would preclude the department from automatically denying him gain-time eligibility and instead would compel it to exercise its discretion. The writ would require the department to consider Gould "as eligible for gain time and to award him any and all gain time which he should have earned for time served to date."

II.

The department sought "second-tier" appellate review from this court in the form of certiorari. *See Sheley v. Fla. Parole Comm'n*, 720 So. 2d 216, 217–18 (Fla. 1998) (holding that a district court reviews a trial court's denial of relief while operating in a "review capacity" via certiorari because there is no entitlement to "a second plenary appeal on the merits"); *Fla. Parole Comm'n v. Taylor*, 132 So. 3d 780, 784 (Fla. 2014) (adhering to *Sheley* and

[5] This is the equivalent of an alternative writ. *See* Fla. R. Civ. P. 1.630(d)(2).

again concluding "that second-tier certiorari relief should be granted only where the circuit court departed from the essential requirements of law and that departure resulted in a miscarriage of justice"). We, however, treat the department's petition as a request for direct appellate review of the trial court's final order. *Cf. Johnson v. Citizens State Bank*, 537 So. 2d 96, 97 (Fla. 1989) ("There is no question that an appellate court has jurisdiction to review a cause even though the form of appellate relief is mischaracterized."); *see also Skinner v. Skinner*, 561 So. 2d 260, 262 (Fla. 1990) (concluding that even though a party mischaracterized an appeal as a petition for writ of certiorari, the court possessed jurisdiction to review as a notice of appeal); *see* Art. V, § 2(a), Fla. Const. (authorizing the supreme court to adopt a "requirement that no cause shall be dismissed because an improper remedy has been sought"); Fla. R. App. P. 9.040(c).

Before turning to review of the final order, then, we must explain why we are handling the case in this way. In doing so, we also hope to clear up some confusion that has developed regarding what sometimes are called "*Sheley* appeals." The confusion perhaps emanates from a subtle distinction between two ways a writ of mandamus may operate against an administrative agency vested with discretionary authority over a matter impacting an individual right.

Mandamus is an ancient writ rooted in English common law. It was used "to prevent disorder from a failure of justice" where there was no other remedy but "where in justice and good government there ought to be one." *Towle v. State ex rel. Fisher*, 3 Fla. 202, 209 (1850) (quoting Lord Mansfield). The writ became known in the United States

> as a command issuing from a common law court of competent jurisdiction, in the name of the state or sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a particular duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.

JAMES L. HIGH, A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO AND PROHIBITION (2d ed.

1884). The writ "lies to enforce a ministerial act," and the petitioner must have a "clear" right to the performance of that act. *City of Miami Beach v. State ex rel. Epicure, Inc.*, 4 So. 2d 116, 117 (Fla. 1941). "A ministerial act is distinguished from a judicial act in that in the former the duty is clearly prescribed by law, the discharge of which can be performed without the exercise of discretion." *Id.* Historically, "[i]f the discharge of the duty requires the exercise of judgment or discretion the act is not ministerial and mandamus will not lie." *Id.*

At the same time, mandamus has remained consistently available in Florida over the years to order an officer to exercise his discretion where it is his duty to do so. *Towle*, 3 Fla. at 210 (distinguishing between the proper use of mandamus, which can order an officer "who acts in a judicial or deliberative capacity . . . to proceed to do his duty, by deciding according to the best of his judgment," and the impermissible use of mandamus, which cannot "direct [the officer] in what manner to decide"); *see also State ex rel. Moody v. Barnes*, 5 So. 722, 724–25 (Fla. 1889) (explaining in matters that require the exercise of official judgment or discretion, "*mandamus* will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given," but it will lie "to set them in motion" and require their exercise of "judgment and discretion" (internal quotation and citation omitted)).

The scope of mandamus quickly expanded to reach more than just an officer's failure to exercise discretion, as the supreme court saw little distinction between that outright failure and an illegal exercise of that discretion. *Barnes*, 5 So. at 725 (treating discretion exercised "capriciously, arbitrarily, or oppressively" as "being equivalent to a refusal to act"); *see also id.* at 727 (explaining that mandamus may be used to compel the exercise of discretion free from a "mistake [] made in law not germane to the discretion"); *cf. Towle*, 3 Fla. at 211 (suggesting that mandamus may be used by a superior tribunal to compel a lower tribunal to exercise discretion in accordance with "established legal principles" (citation omitted)). By the 1940s, the supreme court approved the use of mandamus to control the exercise of discretion that "is abused and illegally violates rights of complaining parties." *Nelson v. Lindsey*, 10 So. 2d 131, 133 (Fla. 1942).

Parallel to this expansion of mandamus, the supreme court had started allowing the writ, under some circumstances, to serve as an avenue for judicial review of administrative action that involved fact-finding. *See State ex rel. Pinellas Kennel Club v. State Racing Comm'n*, 156 So. 317, 317 (Fla. 1934) ("When discretion is given by law, but is arbitrarily or clearly erroneously exercised or abused by the official action of a board, such as the state racing commission, such official action is subject to judicial review on mandamus, and redress may be had on such writ, where no other adequate legal remedy exists."); *but cf. De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (noting that mandamus "is not an appellate writ" and "not an appropriate process to obtain a review of an order entered by a judicial or quasi-judicial agency acting within its jurisdiction"); *Solomon v. Sanitarians' Registration Bd.*, 155 So. 2d 353, 356 (Fla. 1963) ("Similarly, mandamus cannot be employed as an appellate remedy to review quasi-judicial action of an administrative agency.").

To be sure, even for the court in *De Groot* and *Solomon*, some discretionary administrative action could be subject to judicial review. In both cases, the court distinguished between a "quasi-judicial" function and an "executive" function. If "notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive." *De Groot*, 95 So. 2d at 915; *accord Solomon*, 155 So. 2d at 356. The supreme court observed that because "certiorari is in the nature of an appellate process, [that writ] is a method of obtaining [appellate] review" of an order entered by an agency in a quasi-judicial capacity, "as contrasted to a collateral assault" through mandamus. *De Groot*, 95 So. 2d at 916; *accord Solomon*, 155 So. 2d at 356; *see also Sirmans v. Owen*, 100 So. 734, 735 (Fla. 1924) ("The writ of certiorari lies only to review the actions of courts, boards, or officers exercising functions clearly judicial or quasi judicial."). An agency's exercise of discretion while it operates in an executive or purely administrative capacity is off-limits from judicial review but remains "subject to direct or collateral attack." *De Groot*, 95 So. 2d at 914; *see Solomon*, 155 So. 2d at 356 (explaining that "a purely ministerial function" of an agency "may be compelled by mandamus").

In 1974, against this historical backdrop, the supreme court used mandamus to correct what it perceived to be a constitutional infirmity in a quasi-judicial proceeding conducted by the parole commission. *See Moore v. Fla. Parole & Prob. Comm'n*, 289 So. 2d 719 (Fla. 1974). According to the court, "[w]hile there is no [absolute] right to parole, there is a right to a proper consideration for parole," and a prisoner is entitled "to have the question of his eligibility for parole determined upon evidence which passes constitutional muster." *Id.* at 720. In turn, the parole commission must "comply with constitutional requirements" and "cannot deny parole upon illegal grounds or upon improper considerations. It is answerable in mandamus if it does." *Id.* To fit the relief within the historical use of mandamus outlined above, the supreme court put what it was doing in the following terms:

> In short, the alternative writ does not direct itself toward the issue of whether parole should be granted to the petitioner, but to the issue of whether certain matters were and should have been considered by respondent in its denial of parole to the petitioner. The writ itself, if it be granted after respondent has responded to the alternative writ, *would not command the respondent's discretion*, but rather would *compel the respondent to exercise its discretion* as to the granting or denial of parole without [the improper] consideration of the aforementioned convictions.

Id. (emphasis supplied). Going forward, mandamus became the accepted method of "judicial review" of parole commission quasi-judicial determinations. *See Griffith v. Fla. Parole & Prob. Comm'n*, 485 So. 2d 818, 820 (Fla. 1986); *see also Sheley*, 720 So. 2d at 217 ("Mandamus is an accepted remedy for reviewing an order of the Florida Parole Commission."); *but cf. Sheley v. Fla. Parole Comm'n*, 703 So. 2d 1202, 1205 n.2 (Fla. 1st DCA 1997), *approved,* 720 So. 2d 216 (Fla. 1998) (noting that the use of mandamus to review the merits of a parole commission order was "well beyond its limited function" and questioning whether "certiorari might have been a more appropriate remedy").

The same year that *Moore* came out, the United States Supreme Court held that prison inmates are constitutionally

entitled to certain "minimum procedures" in disciplinary proceedings where they have a "liberty" interest at stake (*e.g.*, loss of "good time credits") to ensure "that the state-created right is not arbitrarily abrogated." *Wolff v. McDonnell*, 418 U.S. 539, 556–57 (1974); *see also id.* at 558 ("Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed."). Mandamus in Florida of course expanded to cover review of prison quasi-judicial disciplinary proceedings to ensure the minimum due process requirements were being observed in that context too. *See, e.g.*, *Plymel v. Moore*, 770 So. 2d 242, 247–49 (Fla. 1st DCA 2000) (noting that under *Wolff*, "[i]n a prison disciplinary proceeding, an inmate is entitled to: (1) advance written notice of the disciplinary charges; (2) an opportunity to call witnesses and present documentary evidence regarding his case; and (3) a written statement of the evidence relied on and reasons for the disciplinary action"; and that mandamus can be used to compel the department to comply with its procedural rules that secure to the prisoner the constitutional minimum of due process); *see also Woullard v. Bishop*, 734 So. 2d 1151, 1152 (Fla. 1st DCA 1999) (confirming that mandamus "is the appropriate remedy for seeking review of a prison disciplinary proceeding allegedly conducted in violation of constitutional requirements or the rules of the Department of Corrections"); *Adams v. Wainwright*, 512 So. 2d 1077, 1078 (Fla. 1st DCA 1987) (explaining that mandamus is the appropriate remedy to enforce a prison official's "duty under the United States Constitution" to allow a prisoner to call witnesses in a disciplinary proceeding where he faces the loss of gain time).

This is where the historical review of mandamus puts us. When a trial court considers a mandamus complaint that challenges the constitutional sufficiency of a quasi-judicial prison or parole commission proceeding, it necessarily will engage in judicial review of that proceeding. A final order on that type of complaint "is reviewable in the district court by certiorari pursuant to Florida Rule of Appellate Procedure 9.030," which provides for "certiorari jurisdiction" to review a final order of a trial court acting in its "review capacity." *Sheley*, 720 So. 2d at 217; *see* Fla. R. App. P. 9.030(b)(2)(B); *cf. City of Deerfield Beach v. Vaillant*,

419 So. 2d 624, 626 (Fla. 1982) (holding that a final order of a trial court "acting in its review capacity to review administrative action" is not appealable to the district court as a matter of right because the agency action "has already been directly 'appealed' to the" trial court); *see also Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (explaining that where a trial court reviews agency action, it in essence functions "as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency," so review in the district court is by certiorari).[6]

A district court, then, must consider qualitatively the underlying complaint to determine how to handle review of the trial court's order. If the request for mandamus necessitated a review by the trial court of a quasi-judicial administrative hearing to determine whether minimum due process expectations were met, the review in the district court will be by second-tier certiorari. If the complaint instead asked the trial court simply to order an administrative officer to exercise his discretion—after the officer had refused in the face of the complainant's clear legal right to it—this court's review of the disposition on such a request will be by direct appeal.

Gould's complaint for mandamus did not challenge the department's compliance with constitutional demands of due process in connection with the determination of his entitlement to incentive gain-time. He did not ask the trial court to act as an appellate court and review a quasi-judicial proceeding for constitutional sufficiency. Indeed, there was no quasi-judicial proceeding at all, because the department refused to exercise its discretion.

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[6] Because the level of review gets narrower "[a]s a case moves up the appellate ladder," the district court's review of a trial court's order in this context is limited to determining whether the court "afforded procedural due process and applied the correct law." *Vaillant*, 419 So. 2d at 626; *see also Heggs*, 658 So. 2d at 530 (characterizing "these two components" as "merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law").

The mandamus that Gould sought was to compel the department to exercise its discretion in the first place and consider him for incentive gain-time. He asserted that the incentive gain-time statute gave him a clear legal right to be considered, and even though the department's determination of his entitlement is discretionary, it had a legal duty to consider him. This type of complaint for mandamus seeks the traditional common-law relief discussed above, so it seeks the relief from the trial court *qua* a trial court, not an appellate court. The final order of the trial court granting Gould relief "is reviewable by appeal." *Sheley*, 703 So. 2d at 1206; *cf. Zopf*, 686 So. 2d at 680 (reviewing order denying mandamus as a direct appeal where prisoner sought to compel the department to consider him for gain-time); *see also Miller v. Dugger*, 565 So. 2d 846 (Fla. 1st DCA 1990) (same).

We in turn treat the department's petition as a request for plenary appellate review. Because the trial court based its order granting mandamus relief on a statutory interpretation and not on a resolution of a fact dispute, we review the order de novo.

III.

We mentioned at the beginning that the order under review grants mandamus. The writ would compel the department to *consider* Gould for incentive gain-time under section 944.275(4)(b), Florida Statutes. Notably, the writ would not require a *grant* of incentive gain-time. The mandamus granted by the trial court simply would require that the department exercise its discretion; it would not purport to direct the department on what the result of that discretion must be. As we discussed in the preceding part, this was an appropriate use of mandamus.

The question for us in this case boils down to whether Gould has a clear legal right to the exercise of discretion by the department when it comes to incentive gain-time. He has that entitlement only if his offense of conviction is not a "violation of" section 794.011. Otherwise, he would be ineligible for consideration and not entitled to mandamus. To provide an answer here, we must consider whether the analysis in *Wilcox* is correct.

We decided to hear this case en banc because *Wilcox* cannot be reconciled with the language of section 777.04. *See* Fla. R. App.

P. 9.331(a); First DCA Internal Operating Procedure 6.3. Even though *Wilcox* addressed a different statute (dealing with when sex offender probation should be imposed), it baldly imposes an approach to applying section 777.04 that does not conform to its text. *Wilcox* is wrong. Because the stated legal principle that drove the result in *Wilcox* would otherwise be applicable to nearly identical statutory language in this case, receding from *Wilcox* is necessary to a textually consistent application of statutory cross-references like the one found in paragraph (4)(e). That is what we do here in order to maintain clarity about the nature of the offense of criminal attempt in this district.

A.

Wilcox considered a challenge to the imposition of sex offender conditions of probation. 783 So. 2d at 1150. At the time, section 948.03 provided for those conditions for "violation of chapter 794." § 948.03(5)(a), Fla. Stat. (1998); *see also id.* (4)(b). The appellant in that case had been convicted of "attempted capital sexual battery," and he argued that sex offender conditions did not apply to him because his criminal attempt was a crime under chapter 777, not chapter 794. In a one-sentence analysis, as part of a two-paragraph opinion, this court stated as follows: "As we said in *Zopf v. Singletary,* 686 So. 2d 680, 681 (Fla. 1st DCA 1996), attempted sexual battery is 'a crime under section 794.011(2), Florida Statutes, as modified by the 'attempt' statute, section 777.04, Florida Statutes." *Wilcox*, 783 So. 2d at 1150–51.

We note that the text that *Wilcox* quoted from *Zopf* was an appositive phrase, *i.e.*, it simply restated the charge to which the appellant in that case had pleaded to. The phrase was in the prefatory portion of the opinion, but the *Zopf* Court nevertheless seemed to accept the correctness of this proposition put forward by the department. Still, the stated "principle" (which itself is nowhere explicated) was not central to the disposition on account of the fact that the statute under consideration in *Zopf* was applicable to a person "convicted of committing a sexual battery" rather than someone convicted of violating a particular statutory provision. *Zopf*, 686 So. 2d at 681–82. In *Zopf* the court implicitly made a distinction between an exclusion based on such a reference (*e.g.*, a violation of "section 794.011" or "chapter 794") and one

based on a reference to the common name for the crime (*e.g.*, "sexual battery").

This distinction, when considered with how *Wilcox* referenced the prefatory "as amended" language in *Zopf*, militates against the viability of the decision as support for the conclusion reached by the trial court in this case. We say this with an eye toward *Wilcox*'s express abrogation of *Lee v. State*, 766 So. 2d 374 (Fla. 1st DCA 2000), even though it purported to follow *Zopf*. The only feature that seemingly distinguishes the two cases is the statute being considered. Unlike in *Zopf*, the statute in *Lee did* apply to violations of "chapter 794," among others (rather than to commonly known crimes like "sexual battery"). *Wilcox* presumably disapproved of *Lee*, but not *Zopf*, because of the assumption that the criminal attempt provision in section 777.04 effectively amends any substantive criminal statute that a defendant attempts (but fails) to violate, such that a specific cross-reference to the substantive criminal statute (unlike a reference to the common name) includes both the violation of the substantive provision and the criminal attempt to do so.

Regardless of its strained reliance on (and failure to recede from) *Zopf*, *Wilcox* is wrong to the extent it can be read to hold both that section 777.04 (the criminal attempt statute) modifies a substantive statute and that an attempt to commit the underlying crime is not a separate offense. *Zopf* also is wrong to the extent it suggests the viability of the same principle. We now explain why this "principle" is wholly inconsistent with the text of section 777.04.

B.

Section 777.04(1), Florida Statutes defines the offense of criminal attempt as follows:

> 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.

(emphasis supplied).

The criminal attempt statute does not cross-reference any other criminal offense provision or state that it serves to modify any such provision. The highlighted language instead points to a criminal attempt being an offense separate from the offense attempted. The language distinguishes between "an offense prohibited by law" and "the offense of criminal attempt." Later paragraphs in the statute repeatedly reference "criminal attempt" as a free-standing offense. For example, subsection (4) states the phrase "the offense of criminal attempt" six times. *See, e.g.*, § 777.04(4)(a), Fla. Stat. (providing that "*the offense of criminal attempt* . . . is ranked for purposes of sentencing under chapter 921 and determining incentive gain-time eligibility under chapter 944 one level below the ranking under s. 921.0022 or s. 921.0023 of *the offense attempted*, solicited, or conspired to" (emphasis supplied)); *id.* (4)(b) ("[I]f the *offense attempted* . . . is a capital felony . . . the *offense of criminal attempt . . . is a felony* of the first degree." (emphasis supplied)); *id.* (4)(c), (d), (e) (continuing to distinguish between the "offense attempted" and the "offense of criminal attempt" and defining criminal attempt as "a felony" of some degree or "a misdemeanor" of some degree (depending on the classification of "the offense attempted") all "punishable as provided in" sections 775.082, 775.083, or 775.084). Subsection (5) provides for several unique defenses to the "charge of criminal attempt." *Id.* (5).

The Legislature meanwhile has filled the criminal statutes with examples that demonstrate it knows how to specify when it wants an attempt to be an offense in violation of a provision other than section 777.04. A prime example of this is the sexual battery statute itself, which in a couple spots (as we already noted) criminalizes both sexual battery and an attempt that results in injury to the sex organs. *See* § 794.011(2)(a), (b), Fla. Stat. There are many other examples.[7] Under these statutes, "a conviction for

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[7] *See, e.g.*, § 104.16, Fla. Stat. (stating that someone who "votes or attempts to vote a fraudulent ballot" commits a felony);

the principal substantive offense may be obtained based on a finding that the defendant attempted to commit the crime." *Carruthers v. State*, 636 So. 2d 853, 855 (Fla. 1st DCA 1994).

No reasonable reading of the text of section 777.04 could give rise to a conclusion that "criminal attempt" is an offense prohibited by some other statute, "as modified" by section 777.04, rather than a separate offense with its own specified punishment. This approach, as used in *Wilcox*—equating the offense of attempt with the offense of sexual battery being attempted—also is out of step with the traditional view of the nature of criminal attempt.

The criminalization of a general "attempt" is the criminalization of intent rather than any particular action or result. *See Bunch v. State*, 50 So. 534, 535 (Fla. 1909) (equating an

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§ 560.111(2), Fla. Stat. (stating that a person "may not knowingly execute, or attempt to execute," a scheme or artifice to defraud a money services business"); § 775.087(1), (2)(d), (3)(d), Fla. Stat. (providing for felony reclassification and enhanced sentencing for someone who "carries, displays, uses, threatens to use, or attempts to use any weapon or firearm" during the commission of a felony); § 775.33(2)(c), (3), Fla. Stat. (stating that someone who "attempts" to "provide material support or resources" in connection with terrorist activity commits a first-degree felony); § 784.0495(1), Fla. Stat. (making it unlawful to "attempt to compel or induce [] another person to do or refrain from doing any act or to assume, abandon, or maintain a particular viewpoint against his or her will"); § 784.085(1), Fla. Stat. (making it unlawful "to knowingly cause or attempt to cause a child to come into contact with" various offensive materials); § 787.025, Fla. Stat. (providing that an adult who "intentionally lures or entices, or attempts to lure or entice" a child "into a structure, dwelling, or conveyance for other than a lawful purpose" commits a crime); § 790.161, Fla. Stat. (providing that someone commits a felony if he or she "attempts to make, possess, throw, project, place, or discharge any destructive device"); *see also Carruthers v. State*, 636 So. 2d 853, 855 (Fla. 1st DCA 1994) ("Where the Legislature intended for the endeavor or attempt to commit a crime to be included as a violation of the substantive offense, it has so stated." (citing several more examples)).

"attempt" to commit a crime with the "intent" to commit it). No crime can be committed by bad thoughts alone. 1 W. LAFAVE, SUBSTANTIVE CRIMINAL LAW §§ 6.1, 6.1(b), at 422–24 (2d ed. 2003)). Bad intent still may be criminalized, but only if the bad thoughts produce some act. *Id.* For this reason, to prove criminal attempt in Florida, there must be evidence of an "intent to commit a crime, coupled with an overt act apparently adapted to effect that intent, carried beyond mere preparation, but falling short of execution of the ultimate design." *Gustine v. State*, 97 So. 207, 208 (Fla. 1923); *see also Gentry v. State*, 437 So. 2d 1097, 1098 (Fla. 1983) (noting "our commonly-accepted definition of attempt: a specific *intent* to commit the crime and an overt act, beyond mere preparation, done towards the commission"); *Littles v. State*, 384 So. 2d 744, 744 (Fla. 1st DCA 1980) ("An attempt consists of a specific intent to commit the crime, and a separate overt, ineffectual act done towards its commission."); *but cf. Gentry*, 437 So. 2d at 1098–99 (holding "that there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense").

The generalized offense of criminal attempt, then, addresses a public peril different from that addressed by a statute defining a specific, substantive offense. For many general intent criminal statutes, if a perpetrator intentionally completes all the acts and brings about the result as specified by statute to constitute a complete crime, he has violated that statute, even if it was not his specific intent to commit the offense defined. The completion of the crime authorizes imposition of the punishment tied to the offense. The peril addressed by the offense statute is the public harm that flows from the criminalized conduct.

By contrast, a general "criminal attempt" statute like we have here addresses a separate public peril, one that flows from someone having the intent to commit a crime, even if he does not complete the offense and cause injury to another or to the public. Common sense tells us that a perpetrator's failure to complete the crime defined means that he has not violated the statute defining it, the offense remains inchoate, and punishment for that offense is not authorized. The Legislature, however, should not have to wait for the perpetrator to try again with success (and have the offense become choate) before he can be subject to public

correction. After all, the public peril remains, even if the perpetrator has not succeeded in causing the public harm addressed by an underlying offense. In turn, the Legislature enacted section 777.04 to punish that criminal intent once it manifests itself as action. Under this statute, punishment is authorized for that criminal *intent* as a *separate* offense, even if the intent did not result in a completed substantive offense. The Legislature also opted, per its prerogative, to tie the severity of the punishment for the intent to the severity of the punishment it set for the underlying offense. This no doubt is so because there is greater public peril posed either by an intent to commit a more serious crime or by a generalized criminal intent that manifests itself as action toward commission of a more serious crime.[8]

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[8] Because the severity of the penalty for the offense of criminal attempt turns on the severity of the underlying offense attempted, as a matter of due process, a defendant is entitled to notice of the underlying offense in the charging instrument and to a jury instruction setting out the elements of that offense. *Cf. Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (requiring that any fact, other than that of a prior conviction, that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" be proven to a jury beyond a reasonable doubt); *Arnett v. State*, 128 So. 3d 87, 88 (Fla. 1st DCA 2013) ("In order to enhance a defendant's sentence under section 775.087(2), the grounds for enhancement must be clearly charged in the information."); *Goldson v. State*, 293 So. 3d 569, 570 (Fla. 1st DCA 2020) ("Generally, where a certain factual finding is necessary to implicate a sentence enhancement statute, the State must charge that fact in the information or cite the enhancement statute in order to provide notice to the defendant that he may face the enhancement."); *see generally Jones v. United States*, 526 U.S. 227 (1999) (holding that due-process notice and jury trial guarantees require that a fact triggering a statutory provision that establishes more severe penalties must be charged and proven to a jury beyond a reasonable doubt). Comportment with these constitutional notice and jury trial requirements does not, however, equate with treatment of a violation of the criminal attempt statute with violation of the underlying, uncompleted offense.

Returning to the question at hand, 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 the completed offense defined in that provision.[9] Section 777.04 does not modify any criminal offense statutes. It is a standalone crime with its own punishment scheme, and a violation of the statute does not constitute a violation of any other criminal statutes. Gould was convicted of criminal attempt, as it is defined in section 777.04, and not sexual battery, as it is defined in section 794.011. Consequently, section 944.275(4)(e) does not render Gould ineligible for incentive-gain-time consideration, and he is entitled to that discretionary consideration by the department.

C.

We drop a post-script here before we close to address Judge Bilbrey's assertion that our analysis conflicts with the supreme court's decisions in *Coicou v. State*, 39 So. 3d 237 (Fla. 2010), and *Weatherspoon v. State*, 214 So. 3d 578 (Fla. 2017). We explain why these decisions do not impel a different result in this appeal. We also want to clarify that this court's decision in *Hurst v. State*, 257 So. 3d 1202 (Fla. 1st DCA 2018), contrary to Judge Bilbrey's suggestion, remains intact and untouched by our disposition here.

Let us first take *Coicou*. The certified question that the supreme court answered was as follows: "MAY AN APPELLATE COURT DIRECT THE ENTRY OF A CONVICTION FOR ATTEMPTED SECOND-DEGREE MURDER WHERE THE JURY'S VERDICT DOES NOT REFLECT A FINDING THAT THE DEFENDANT ACTED WITH A DEPRAVED MIND?" *Coicou*, 39 So. 3d at 238. The question before the court was "whether the jury's verdict of guilty on the charge of attempted

[9] We think it worth noting the specificity with which the Legislature identified disqualifying offenses. A characteristic common across all of the specified offenses is the requirement that there be conduct resulting in actual harm to another. As we already discussed, the general offense of criminal attempt addresses bad (and perilous) thoughts, not harmful action.

first-degree felony murder provided an adequate basis for directing—pursuant to section 924.34—the entry of a conviction for attempted second-degree murder." *Id.* at 240. It was looking at elements in the context of lesser-included offenses, not the statutory text we are looking at here. To do that, the court had to compare the elements of a criminal attempt specifically defined by statute, attempted felony murder (*i.e.*, "codified in section 782.051, Florida Statutes"), with those for the generalized offense of criminal attempt with reference to the incomplete offense of second-degree murder (*i.e.*, "codified in section 777.04(1), Florida Statutes (2001), defining attempt, and section 782.04(2), Florida Statutes (2001), defining second-degree murder"). *Id.* at 240–41; *cf.* Fla. Std. Jury Instr. (Crim.) 6.3.

The supreme court's characterization of general criminal attempt is unremarkable and consistent with how we have explained it: One needs to look to both the attempt statute and the underlying offense statute to know what the elements are. As we mentioned above, because the severity of punishment for the criminal attempt charged turns on the underlying offense attempted, due-process and jury-trial constitutional guarantees require that the underlying offense that was attempted be specifically charged and proven to the jury beyond a reasonable doubt. In other words, the jury must determine whether the defendant did "any act toward the commission of" the specified offense to authorize a punishment for the attempt based on the punishment specified for the underlying offense. This is much different than saying an attempt is actually a violation of the underlying statute "as modified" by the attempt statute, which the supreme court in *Coicou* had no need to address.

Next is *Weatherspoon*. In that case, the supreme court once again was dealing with the separately enumerated offense of attempted felony murder. The court held as follows:

> Because the statutory crime of attempted felony murder is a crime separate from attempted premeditated murder with different elements and different punishments, the State must charge the crime of attempted felony murder in order to be entitled to a jury instruction on that crime and proceed under that theory.

Weatherspoon, 214 So. 3d at 580. Like in *Coicou*, the supreme court was addressing offense elements, not the statutory text at issue in this appeal. And like in *Coicou*, to make this elements comparison, the supreme court noted that "[t]he crime of attempted premeditated murder is codified in section 782.04 (Murder), and section 777.04 (Attempts, solicitation, and conspiracy), while the crime of attempted felony murder is now codified in section 782.051 (Attempted felony murder)." *Weatherspoon*, 214 So. 3d at 586. Once again, a passing statement like this is unremarkable. To know the elements of the offenses of criminal attempt, there must be a reference to both the attempt statute and the underlying offense that the perpetrator had the intent to commit. This reference, however, does not mean that a conviction for the attempt equates with conviction of the underlying offense. *Weatherspoon* does not hold otherwise.

Finally, there is *Hurst*. This court was considering an entirely different statute in that case, but in any event, it is consistent with our analysis. The decision addresses the interplay of two sentencing statutes that together determine what interval of review to give a juvenile sentenced under certain circumstances. *See* §§ 775.082, 921.1402, Fla. Stat. The juvenile had been convicted of attempted premeditated murder with a firearm and sentenced to life in prison. The trial court determined he was entitled to a sentence review after he had served twenty-five years, because he had been convicted "under s. 782.04 of an offense that was reclassified as a life felony," committed while he was a juvenile. § 775.082(3)(a)5.a., Fla. Stat. The court rejected the defendant's argument that his attempted murder conviction was not an offense under section 782.04, so his review interval should have been shorter. In doing so, the court explained—in a manner redolent of the analysis in *Coicou* and *Weatherspoon*—that "a person cannot be convicted of the offense of attempt without necessarily proving the elements of some underlying, substantive offense." *Hurst*, 257 So. 3d at 1204. That is true, of course, and we have said the same thing here. Context matters, though, and the *Hurst* court made this observation as part of its interpretation of a different statute with different language.

That statute in *Hurst* references someone "convicted *under* s. 782.04." "Under" as a preposition in this provision means "with

reference to" or "subject to." In this context, then, it is accurate to say that the statute's applicability requires a reference to the specified provision, even if the provision itself does not define the actual offense committed. Indeed, *Hurst* implicitly acknowledges the difference: "This specific language referring to attempt is repeated throughout the statute and applies whether the underlying conviction is for a capital felony, a life felony, or a first-degree felony." *Id.* at 1204. Most importantly, in *Hurst* this court did not say that the attempted murder conviction was a violation of section 782.04 "as modified" by the attempt statute. The court held that the particular provision it was considering included attempted murder because of the statute's repeated references to "attempt." *See* § 775.082(3)(a)5.a.–b., Fla. Stat.; *see also id.* 6.a.–b. The language we deal with in this case requires a "violation of" the statute specified, meaning that all the acts and results defined by the statute must be proven. That is a stricter definition than for a conviction "under" a particular provision, which requires only a reference to it, even if all the elements are not proven.[10]

IV.

Gould has a clear right to consideration for the award of incentive gain-time. There is no statutory preclusion. The department in turn is required to exercise its discretion on that question. Because it refused, the trial court did not err when it granted Gould's request for a writ of mandamus.

AFFIRMED.

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[10] We stop here and do not address Judge Bilbrey's conjecture about what effect our analysis might have in other contexts. Judge Bilbrey in particular speculates that our opinion will affect application of section 948.30, regarding conditions of sex-offender probation, and that our holding may apply to current terms of probation. Our analysis is limited to how sections 777.04 and 944.275 interface; we do not address how the former provision, as we now have interpreted it, might affect the application of section 948.30. In turn, whether our analysis might apply to an offender who committed a crime or was put on probation prior to this decision is not before us.

ROWE, C.J., and B.L. THOMAS, ROBERTS, RAY, OSTERHAUS, WINOKUR, JAY, M.K. THOMAS, NORDBY, and LONG, JJ., concur.

LEWIS, J., concurs in result only.

MAKAR, J., dissents with opinion in which BILBREY and KELSEY, JJ., join.

BILBREY, J., dissents with opinion in which MAKAR and KELSEY, JJ., join.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

MAKAR, J., dissenting from the grant of en banc hearing and on the substantive merits.

Little commends devoting the scarce judicial resources of a fifteen-member appellate court to this run-of-the-mill sexual offender gain-time case, which is unworthy of an en banc hearing after languishing for over three years before an en banc vote was even sought. Upending time-honored precedent with no discernable benefit to society or the legal system is ill-advised as well, particularly when doing so directly thwarts the Legislature's clear and obvious intent to deny gain-time to convicted felons such as Gould, who—because of today's jurisprudential flip-flop—is now eligible for potentially earlier release from prison despite his attempt to commit a sexual battery on a child under twelve years old.

Noteworthy is that the Florida Department of Corrections has dutifully followed and relied upon the applicable statutes and judicial precedents for over twenty years by denying gain-time, probation, and related benefits for such offenders. The Legislature—in apparent agreement with such denials and justifiable reliance on precedent—has done nothing to change the decades-long status quo; it has not expressed disapproval of or sought to overturn long-standing statewide precedents; it has not

sought to revise its statutory framework that disallows gain-time or early release in these situations. Decades of legislative branch and executive branch reliance and acquiescence speak volumes for why the jurisprudential status quo should be left undisturbed.

That's all changed due to this *sua sponte* proceeding, which jettisons this court's twenty-one-year-old unanimous en banc decision in *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001), a reasonable and workable one in which all fifteen judges joined (*see* appendix) and other district courts of appeal have uniformly agreed. By diving into calm precedential waters—and creating conflict and confusion where none has existed for decades—the court has directly undermined legislative intent. It is not a good thing when the Legislature is unnecessarily forced to pass new laws to resurrect what is and has been its clear original intent: that felons convicted of attempted sexual battery may not acquire gain-time and thereby be precluded from early release from prison. Short of that, the Florida Supreme Court is potentially pulled into the foofaraw unnecessarily because the formerly statewide uniform precedent on the topic has become muddled and conflicting due to this court's jurisprudential turnabout.

I.

As its aged case number suggests, this case was lodged in this court a long time ago: March 2019. It is one of the oldest cases on the court's docket. It sat, not for months, but for *three years* before an en banc hearing was sought, meaning the full fifteen-member court rather than the three-member panel, decides the case in the first instance—a rare event.

So why has this mundane prison gain-time case, involving a felon convicted of attempted sexual battery on a minor, suddenly become of utmost importance after lying dormant for three years, such that the entire court must take it up on its own volition without en banc briefing or argument by the parties? The court's internal operating procedures, which parallel the appellate rule, say that en banc proceedings "shall not be ordered unless the case is of *exceptional importance* or unless *necessary to maintain uniformity in the court's decisions*. A decision to grant or deny en banc review on either of these grounds is within the discretion of

the court." IOP 6.4 (emphases added); *see* Fla. R. App. P. 9.331(a) (en banc review shall not be ordered "unless the case or issue is of exceptional importance or unless necessary to maintain uniformity in the court's decisions[]"). Neither basis exists.

No claim is made that this case is of "exceptional importance" because it is not. It is a case of exceptional *non-importance*, making it one of the *least* likely candidates for en banc scrutiny on this basis. That leaves the view that en banc review is "*necessary* to maintain *uniformity*" in this court's decisions, which is exceptionally weak. No *necessity* exists because *uniformity* of precedent already prevails. For over two decades a statewide equilibrium of uniform decisions has existed as to how this Court and other districts[1] have reasonably interpreted the *different sets of statutory language* that underlie the decisions in *Zopf v. Singletary,* 686 So. 2d 680 (Fla. 1st DCA 1996), a *basic gain-time* case, and *Wilcox*, a *probation* case, thereby supporting the relief that the Department seeks in this *incentive gain-time* case. The precedential uniformity that has existed statewide and in this Court is due to statutes that use differing statutory language thereby supporting differing judicial interpretations, but all yielding the same legislatively intended result, which is the denial of gain time, probation, and the like to felony sex offenders, as the next section explains.

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[1] *State v. Fureman*, 161 So. 3d 403, 408 (Fla. 5th DCA 2014) (applying *Wilcox* and holding that trial court "erred in refusing to impose sex offender probation"); *Long v. State*, 158 So. 3d 580 (Fla. 2d DCA 2014) (per curiam citing *Wilcox*); *Williams v. State*, 126 So. 3d 1063 (Fla. 2d DCA 2013) (per curiam citing *Wilcox*); *Hotaling v. State*, 88 So. 3d 942 (Fla. 2d DCA 2012) (per curiam citing *Wilcox*); *Ream v. State*, 843 So. 2d 309 (Fla. 5th DCA 2003) (affirmed with citation to *Wilcox*); *Donovan v. State*, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002) (applying *Wilcox*); *State v. Thurman*, 791 So. 2d 1228, 1230 (Fla. 5th DCA 2001) ("We agree with *Wilcox* that it was not improper for the trial court to subject Thurman to sex offender probation conditions.").

II.

Statutory language matters. When the Legislature uses different statutory language, it typically does so for a reason. Here, the relevant statutes use differing language that imposes restrictions and disqualifications on the availability of gain-time, probation, and community control. For example, the statute in *Zopf* speaks in terms of a *conviction* for a *sexual battery* while the statutes in *Wilcox* and this case speak in terms of an *offense* that *violates* either *section 794.011* or *chapter 794*, which explains the interpretative differences. The *basic gain-time* statute at issue in *Zopf* refers to a "convict[ion]" for "sexual battery" as the *only* disqualifier. *See* § 794.011(7), Fla. Stat. (2022) ("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." (Emphases added)). Because this statute's language is so narrowly drawn, requiring a *conviction* for the offense of *sexual battery* as the sole disqualifier, it makes sense that Zopf's conviction for attempted sexual battery didn't fit the restrictive statutory language, resulting in this court granting him relief. Indeed, *Zopf* remains good law due to the restrictive statutory language in the basic gain-time statute, which has not changed to date (and only applies to convictions prior to 1994).

In contrast, the *incentive gain-time* statute at issue here—much like the *probation* statute in *Wilcox*—doesn't use the word "convicted" or the phrase "sexual battery" as a disqualifier. It uses an entirely different approach. Rather than specify a conviction for sexual battery as the only disqualifier, it is much more broadly worded and applies to "offenses" that are "violations" of specified statutes as disqualifiers. § 944.275(4)(e), Fla. Stat. (2022) (". . . 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; s. 825.1025; or s. 847.0135(5)." (Emphases added)). The statutory language in the two gain-time statutes is different; a *conviction* for *sexual battery* is much narrower compared to *offenses* that are *violations* of *section 794.011* generally. In other words, the basic gain-time statute is narrowly drawn while the incentive gain-time statute at issue here is not.

This significant difference in the language is likely why the en banc court in *Wilcox* unanimously held that the *probation statute* in that case applied to a person who had committed an attempted sexual battery, i.e., an *offense* that was a *violation* of chapter 794. The probation statute in *Wilcox* imposed additional restrictions for those placed on supervision "*for violation of chapter 794*, s. 800.04, s. 827.071, or s. 847.0145." *See* § 948.03(5), Fla. Stat. (2000) (emphasis added). As highlighted, the *probation* statute in *Wilcox*—much like the *incentive gain-time* statute at issue here—deals with "*violations*" of "*s. 794.011*" or "*chapter 794*"; neither narrowly limits itself to a "conviction" for "sexual battery" as the sole disqualifier, as was the case in *Zopf*.

For this reason, *Wilcox* held it was error in *Lee v. State*, 766 So. 2d 374 (Fla. 1st DCA 2000) (*see* appendix)—a community control case—to extend *Zopf* (a basic gain-time case involving *only* a "sexual battery" disqualifier) to the community control context, which is governed by different statutory language (i.e., a violation of chapter 794); that's why *Lee* was overruled. The community control statute defined ineligibility differently and more broadly compared to the basic gain-time statute; the decision in *Wilcox*—though not a model of clarity—can readily be seen as based on these important statutory differences.[2]

Plus, real-life practices and procedures matter. As the relevant trial court documents in this case clearly show, Gould was specifically charged with having committed an *offense* in *violation* of section *794.011* and section 777.04. The charging document itself says unequivocally that Gould engaged in conduct "in *violation of* Florida Statutes *794.011(2)* and 777.04, attempt to commit a sexual battery upon . . . a person less than 12 years of age." Similarly, the final judgment in this case states that Gould was adjudicated guilty of attempted sexual battery under the

[2] Chief Judge Barfield wrote for the unanimous court, which included the two remaining judges from the panel in *Lee* who—despite their panel's divergent viewpoint—apparently agreed with receding from their decision (which, in light of this case, may be applicable law again).

authority of section *794.011(2)* and 777.04, a first-degree felony. The substantive statute is highlighted because Gould was charged with and convicted of a violation of 794.011(2) in conjunction with the attempt statute, section 777.04, as *Wilcox* and all other related cases have held. Criminal defendants are not charged with violating section 777.04 in isolation; that's because the attempt statute, by itself, does not establish a crime without reference to and inclusive of a substantive statute. Time-honored and customary charging documents and judgments used statewide recognize and reflect this legal principle.

As such, the established practices and documents used in this category of cases reflect what prosecutors, defense counsel, trial judges, appellate courts, the Legislature and the Department of Corrections have understood for decades: an *offense* that is in *violation* of the sexual offender statute—even if an attempt—is grounds for denying gain-time, probation, and the like. As the Fifth District has held, an "attempted sexual battery is an offense under the sexual battery statute, as opposed to the attempt statute," which derives from *Wilcox* and other established cases. *State v. Fureman*, 161 So. 3d 403, 407 (Fla. 5th DCA 2014). Twenty years ago, the Fifth District explained why this is so, responding to a sexual offender's reliance on *Lee*:

> Donovan also appeals his sentence, arguing that the trial court erred in imposing sex offender conditions on his probation. To support this claim the defendant cites to *Lee v. State,* 766 So.2d 374 (Fla. 1st DCA 2000) where the First District held that it was impermissible to impose conditions of probation authorized for persons convicted of sexual battery on persons convicted of "attempted" sexual battery. We reject this argument because, in *Wilcox v. State,* 783 So.2d 1150 (Fla. 1st DCA 2001), the First District receded from its decision in *Lee* and held that *attempted capital sexual battery was an offense under the sexual battery statute, rather than merely an offense under the attempt statute* and, therefore, the trial court could properly impose sex offender conditions of probation upon defendant's conviction of attempted capital sexual battery. In *State v. Thurman,* 791 So.2d 1228 (Fla. 5th DCA 2001), we

> adopted the reasoning in *Wilcox,* holding that it was not improper for the trial court to subject a defendant to sex offender probation conditions when he pled no contest to an attempted lewd act upon a child.

Donovan v. State, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002) (emphasis added). Other Florida courts, including a federal district court, have recognized that a violation of the sexual battery statute, in conjunction with or as modified by the attempt statute, is a recognized interpretation of Florida law. *Timmons v. Sec'y, Fla. Dep't of Corr.*, No. 5:12-cv-672-Oc-29PRL, 2016 WL 931105, at *7 (M.D. Fla. Mar. 11, 2016) (holding that sexual offender statute applied to the petitioner "to the extent it was modified by the 'attempt' statute" noting that information charged petitioner "under § 794.011(3) and § 777.04); *see also Wilcox v. State*, 783 So. 2d 1150, 1151 (Fla. 1st DCA 2001) (explaining generally that the 'attempt' statute modifies the sexual battery statute).").

The point is that *Wilcox* and similar cases take account of the broader statutory language at issue, which differs substantially from the statute in *Zopf*. As such, *Zopf* remains good law as to basic gain-time, as does *Wilcox* as to probation. In this *incentive gain-time* case, however, the trial court erred in applying *Zopf* and its narrower *basic gain-time* statute to the broader *incentive gain-time statute,* whose language is akin to the language in *Wilcox* (i.e., offenses that violate section 794.011 or chapter 794 generally).

III.

All this said, it is evident that this case doesn't fit the en banc mold, particularly in overturning longstanding statutory precedents upon which society—including the Department and the Legislature—has reasonably relied for decades. Instead, principles of stare decisis weigh against upsetting the statutory framework, which has been uniform and well-settled.

> Stare decisis applies with special force to questions of statutory construction. Although courts have power to overrule their decisions and change their interpretations, they do so only for the most compelling reasons—but almost never when the previous decision has been

repeatedly followed, has long been acquiesced in, or has become a rule of property.

Bryan A. Garner et al., *The Law of Judicial Precedent* 333 (2016). As the Supreme Court has repeatedly said, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172–73 (1989) (noting the "burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction."). Discarding a precedent that has proven unworkable or thwarts legislative intent is justifiable in some limited situations, *id.*, but neither the Legislature nor the Department has made the slightest complaint over the past twenty-plus years that judicial interpretations of gain-time and related statutes, particularly as applied to sex offenders, have gone so seriously off the rails that Florida appellate courts must unilaterally and dramatically change their interpretative approach; all is calm on the legislative and executive branch fronts.

* * *

Nothing about this case cries out for en banc review or justifies collectively re-deciding and reversing what a unanimous fifteen-member en banc court decided twenty-plus years ago, a reasonable decision with which other districts and the other branches of Florida government agree. Given that a reasonable basis exists for interpreting the different statutory language differently, no benefit results from departing from precedent. The pragmatic question is whether the Legislature intended that those who *attempt* to sexually assault a minor should be subject to the same *incentive gain-time* restrictions that apply to those who are successful; the answer is yes. A departure from *Wilcox* directly undermines this legislative intent, creates conflict with other districts unnecessarily, and generates confusion where none currently exists; it also undermines the certainty that serious sex offenders, such as Gould, are punished as the Legislature intended. The collateral consequences of the court's decision will ripple—both retroactively and prospectively—into other areas of the law, spawning uncertainty, quizzical questions, and

unforeseen consequences. En banc review is supposed to bring about uniformity; here, the court's decision—the judicial equivalent of an unprompted cannonball dive into a long-placid wading pool—yields the opposite result.

APPENDIX

Wilcox v. State,
783 So. 2d 1150 (Fla. 1st DCA 2001)

EN BANC

BARFIELD, C.J.

John Wilcox was convicted of attempted capital sexual battery and sentenced to a term of imprisonment followed by probation with conditions imposed pursuant to section 948.03, Florida Statutes (Supp.1998). By motion pursuant to Rule 3.800(b), appellant challenged the imposition of the conditions of probation, asserting that attempted capital sexual battery is an offense under chapter 777, Florida Statutes (1997), and not an offense under chapter 794, Florida Statutes (1997).

We affirm the imposition of conditions of probation pursuant to section 948.03, Florida Statutes (Supp.1998), holding that attempted capital sexual battery is an offense under chapter 794, Florida Statutes. As we said in *Zopf v. Singletary*, 686 So.2d 680, 681 (Fla. 1st DCA 1996), attempted sexual battery is "a crime under section 794.011(2), Florida Statutes, as modified by the 'attempt' statute, section 777.04, Florida Statutes." To the extent *Lee v. State*, 766 So.2d 374 (Fla. 1st DCA 2000), holds otherwise, we recede from *Lee*.

We find no merit to the remaining constitutional challenges raised by Wilcox.

AFFIRMED.

ERVIN, BOOTH, MINER, ALLEN, WOLF, KAHN, WEBSTER, DAVIS, BENTON, VAN NORTWICK, PADOVANO, BROWNING, LEWIS, and POLSTON, JJ., concur.

* * *

Lee v. State,
766 So. 2d 374 (Fla. 1st DCA 2000)

PER CURIAM.

Eric Lee (Lee) pleaded no contest to attempted sexual battery, reserving the right to appeal the issue considered here. Adjudication of guilt was withheld and he was placed on community control for two years under conditions enumerated in section 948.03(5)(a), Florida Statutes (1999). This statutory section requires imposition of certain conditions when the offense committed is in violation of chapter 794, Florida Statutes (1997) (sexual battery), as well as other chapters not at issue here. Lee seeks review of his sentence imposing these conditions.

Lee argues that the conditions were illegally imposed since he was not convicted of sexual battery, an offense under chapter 794, but rather attempted sexual battery, an offense under chapter 777, Florida Statutes (1997). We agree and reverse.

This court earlier considered a similar issue in *Zopf v. Singletary*, 686 So.2d 680 (Fla. 1st DCA 1996). We held in that case that the language of section 794.011(7), Florida Statutes (1993), making those convicted of sexual battery ineligible for gain-time, was not applicable to inmates convicted of attempted sexual battery. The rationale of *Zopf* is equally applicable to the instant case. Whether imposition of the conditions at issue are appropriate for those convicted of attempted sexual battery is a legislative matter when, as here, the statute at issue is free of ambiguity.

Accordingly, we reverse that portion of Lee's sentence imposing conditions pursuant to section 948.03(5)(a) and remand to the trial court with instructions to strike the conditions at issue. Lee need not be present for this action.

REVERSED and REMANDED.

ERVIN, LAWRENCE and BROWNING, JJ., CONCUR.

BILBREY, J., dissenting.

The majority disrupts the established law in holding that a defendant can be guilty of attempt solely under section 777.04(1), Florida Statutes. There must be other elements of the offense of attempt taken from the specific statute a defendant is alleged to have attempted to violate. An attempt is an offense that violates both an underlying statute and section 777.04(1). As a result, I would hold that Gould, in committing attempted capital sexual battery, has committed an offense under section 794.011(2)(a), Florida Statutes, and as such is disqualified from claiming incentive gain time by action of section 944.275(4)(e), Florida Statutes. Since the majority holds to the contrary, I respectfully dissent.

Charging the attempt statute alone is insufficient. *See Weatherspoon v. State*, 214 So. 3d 578, 588 (Fla. 2017) (holding that an information that "failed to allege . . . the commission of the underlying felony" was defective in charging attempt). In *Coicou v. State*, 39 So. 3d 237, 241 (Fla. 2010), the Court held that two statutes defined the offense of attempt in stating, "The crime of attempted second-degree murder is codified in section 777.04(1), Florida Statutes (2001), defining attempt, and section 782.04(2), Florida Statutes (2001), defining second-degree murder."[1]

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[1] The majority tries to avoid these holdings from *Weatherspoon* and *Coicou* without explicitly calling them dicta. Even so, we are "bound to follow the case law set forth by" the Florida Supreme Court. *Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973). *Weatherspoon* involved the attempted felony murder statute, section 782.051, Florida Statutes. But its "underlying felony" language applies to attempts charged under other statutes. And *Coicou* clearly applies since the Court needed to determine what was required to prove attempted second-degree murder to decide whether it was a lesser included offense of attempted felony murder. There, the Court held that the crime of attempt involved both section 777.04(1) and the underlying statute. *Coicou*, 39 So. 3d at 241.

We likewise acknowledged that the crime of attempt involves two statutes in *Hurst v. State* where we stated:

> A person cannot be convicted of the offense of attempt without necessarily proving the elements of some underlying, substantive offense. *See generally* § 777.04(1), Fla. Stat. (2016) ("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." (emphasis added)). Here, the underlying offense committed by Hurst was first-degree premeditated murder under the homicide statute, making his conviction and sentence subject to the sentencing provisions of section 775.082(3)(a) 5.

257 So. 3d 1202, 1204 (Fla. 1st DCA 2018).[2]

In overturning *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001) (en banc), the majority has departed from stare decisis on an issue of statutory construction where precedent should be strongest. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977) ("[C]onsiderations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."). Had the Legislature been dissatisfied with *Wilcox* or cases from other districts relying on it, the issue could have been rectified at any time over the past 21 years.

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[2] Contrary to certain cases cited by the majority, the crime of attempt does not always require proof of specific intent. "If the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime." *Gentry v. State*, 437 So. 2d 1097, 1099 (Fla. 1983). The majority's first citation to *Gentry*, stating that proof of specific intent is required to prove attempt, is for "[o]ne school of thought" that the Court rejects. *Id.* at 1098–99.

The majority opinion contends that receding from *Wilcox* is necessary to "maintain clarity about the nature of the offense of criminal attempt in this district." (Maj. Op. at 13). But up until today, the law was clear as Judge Makar discusses. In overruling *Wilcox*, the majority has injected uncertainty by creating direct conflict with the Fifth District which has repeatedly relied on *Wilcox*. *See State v. Fureman*, 161 So. 3d 403, 407–08 (Fla. 5th DCA 2014); *Donovan v. State*, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002); *State v. Thurman*, 791 So. 2d 1228, 1230 (Fla. 5th DCA 2001).[3]

Along with conflicting with Florida Supreme Court precedent, departing from stare decisis, and creating conflict with the Fifth District, the majority's opinion will have odd consequences that the Legislature could not have intended. If an attempt is an offense only under section 777.04, then a defendant who completes any disqualifying offense will not be entitled to seek incentive gain time, *see* section 944.275(4)(e), but a defendant who attempts any otherwise disqualifying offense up to capital sexual battery now will. So, for example, by the majority's holding a defendant who flashes a group of elderly persons in a lewd and lascivious manner, a violation of section 825.1025(4), Florida Statutes, or commits some other disqualifying third-degree felony sex offense, does not have an opportunity for incentive gain time. But a defendant, like Gould, who attempts to sexually batter an infant or child and is stopped just before the execution of the act does get the chance at incentive gain time.[4] This is so, even though the attempted capital

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[3] Since there is conflict that the Florida Supreme Court will likely need to resolve, I do not understand why the original panel was not, at most, content to certify a question to the Court. *See* Art. V, § 3(b)(3), Fla. Const. Furthermore, I agree with Judge Makar that this case did not warrant en banc review.

[4] Gould was adjudicated guilty of one count of attempted sexual battery on a child under twelve following his no contest plea. He was sentenced to 25 years in prison. He had been charged by amended information with two counts of attempted capital sexual battery and two counts of capital sexual battery. Both the amended information charging Gould with attempt and the

sexual battery is a first-degree felony, a much more serious offense punishable by up to 30 years in prison. §§ 777.04(4)(b); 775.082(3)(b)1., Fla. Stat. A third-degree felony is punishable by no more than five years in prison. § 775.082(3)(e).

Likewise, under the majority's holding any sex offender who completed the offense and is placed on probation as part of his or her sentence will remain automatically required to undertake the applicable conditions of sex offender probation. *See Levandoski v. State*, 245 So. 3d 643, 646 (Fla. 2018); § 948.30, Fla. Stat. But anyone who attempts any sex offense, up to attempted capital sexual battery, will now not be statutorily mandated to complete the sex offender conditions of any probation. Again, this is so even though some attempted sex offenses are much more serious crimes than some completed sex offenses. Of course, a trial court could still order sex offender probation as a special condition of probation but would have to pronounce the terms. *See Villanueva v. State*, 200 So. 3d 47, 53 (Fla. 2016).

More troubling, the majority's holding seems to me to apply to existing sentences of probation. For many defendants who attempted a sex offense, a trial judge may have assumed that sex offender probation was imposed automatically by operation of section 948.30. Now due to the majority's holding, those defendants need not complete the sex offender conditions of probation unless they were pronounced at sentencing.

In conclusion, I would continue to hold per *Wilcox* that attempt is an offense under both section 777.04 and an underlying statute. Since Gould was convicted of attempted capital sexual battery, I would uphold the Department's decision that Gould and other attempted sex offenders, disqualified under section 944.275(4)(e), are not entitled to incentive gain time under section 944.275(4)(b). Therefore, I would reverse the circuit court's decision mandating that Gould be considered for incentive gain time. Since the majority affirms, I respectfully dissent.

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judgment entered against Gould cite the statutes on capital sexual battery, section 794.011(2)(a), and attempt, section 777.04.

Lance E. Neff, General Counsel, Mark S. Urban, Deputy General Counsel, Florida Department of Corrections, Tallahassee; and Ashley Moody, Attorney General, and Sheron Wells and Kristin J. Lonergan, Assistant Attorneys General, Tallahassee, for Appellant.

Terrence E. Kehoe, Orlando, for Appellee.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1149

FLORIDA DEPARTMENT OF CORRECTIONS,

Appellant,

v.

MCMILLAN C. GOULD,

Appellee.

On appeal from the Circuit Court for Leon County.
Karen A. Gievers, Judge.

August 12, 2022

ON MOTION FOR CERTIFICATION

TANENBAUM, J.

The court denies the motion for certification filed by the Florida Department of Corrections. A supermajority (thirteen of us) carefully considered the motion and voted to deny it. This decision, like the merits decision that preceded it in this case (also by a supermajority, albeit a slightly smaller one), was born out of a fidelity to the law. Article V, section 3(b)(4), of the Florida Constitution allows the Supreme Court of Florida jurisdiction over a decision of ours "that passes upon a question certified by [us] to be of great public importance" or that we certify "to be in direct

conflict with a decision of another district court of appeal." Those of us voting to deny the motion treated the department's request for each of these certifications seriously and simply concluded that certification was not warranted.

The fact remains that this court had the rectitude to publicly correct itself and bring itself in line with the statutory text. There is no time-bar on getting it right. Such a correction on its own, though, does not suddenly make the underlying question one of great public importance. This unceremonious self-critique and self-correction is just something the public should expect of a district court of appeal—no need for plaudits or laudation or further comment. Public confidence in the judiciary is bolstered by such action alone.

The minor effect the en banc decision might have on a handful of prisoners (speaking relatively, that is: around five hundred out of a prison population of roughly 80,000) does not change the analysis counseling against certification. This, of course, does not mean the court does not take the concerns of the department seriously. Most of the department's operational cases come on appeal to this court; we are ever mindful of the impact our decisions have on the good work that the department performs to implement Florida's criminal punishment code.

But our North Star is the text. This faithfulness has impelled us to correct a glaring error that we made twenty years ago in how we apply the definition of "criminal attempt"—as that offense is described in section 777.04—in the context of the incentive gain-time statute. This faithfulness impels a vote against certification as well. The minor inconvenience the department might suffer from having to retroactively *consider* the relatively few eligible prisoners for gain-time does not qualify as a matter of great importance to the public. The gain-time statute excludes prisoners besides just sex offenders, by the way; but the identity or class of prisoner who might be marginally affected is of no moment regarding the certification decision. At all events, there is no chance of the prison gates suddenly swinging open for anyone. Considering a prisoner for gain-time is not the same as awarding him gain-time, and by law, all of Florida's prisoners now must serve at least eighty-five percent of their sentences. Under these

circumstances, the department's suggested impact of the en banc decision is not a sufficient basis to certify the matter as requiring the attention of our highest court.

We also reject the department's suggestion of "direct conflict" between the en banc decision here and the decisions of the Fifth District Court of Appeal that it cites. Our decision here is to affirm the trial court's issuance of mandamus compelling the department to consider Gould for incentive gain-time. That decision is based on an application of the criminal attempt statute and the incentive gain-time statute. The Fifth District's decisions all had to do with a separate statute governing sex offender probation—not a certifiable conflict under the constitution.

Even a closer look fails to uncover a conflict that we credibly could certify. To be sure, the Fifth District previously has cited *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001), which we now have receded from. As our en banc merits opinion in this case notes, though, *Wilcox* for the most part just pronounced, without legal analysis, a proposition that we now have receded from as being contrary to the statutory text. In none of the opinions in which the Fifth District cited *Wilcox* did it tack on any analysis of its own. *See, e.g.*, *State v. Thurman*, 791 So. 2d 1228, 1230 (Fla. 5th DCA 2001) ("We agree with *Wilcox* that it was not improper for the trial court to subject Thurman to sex offender probation conditions."); *Donovan v. State*, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002) ("In *State v. Thurman,* 791 So.2d 1228 (Fla. 5th DCA 2001), we adopted the reasoning in *Wilcox,* holding that it was not improper for the trial court to subject a defendant to sex offender probation conditions when he pled no contest to an attempted lewd act upon a child."); *State v. Fureman*, 161 So. 3d 403, 408 (Fla. 5th DCA 2014) ("This court reaffirmed its holding in *Donovan v. State,* 821 So.2d 1099, 1102 (Fla. 5th DCA 2002), noting that we had previously adopted the reasoning of *Wilcox* and held that attempted sexual battery is an offense under the sexual battery statute, as opposed to the attempt statute.").

We cannot now say, then, that our analysis in the en banc merits opinion in this case conflicts with the analysis in any of the Fifth District's opinions, which all just cite us and our decision in *Wilcox*. Now that the current en banc majority has receded from

that decision and reached a different conclusion—and backed the conclusion up with detailed reasoning—perhaps the Fifth District, or any of the other district courts, will consider the issue anew and publish its own analysis. If there is agreement with our analysis, the supreme court will not need to get involved. If one or more district courts instead set out reasoning that leads to a conflicting conclusion on the same question, the supreme court will be available to resolve the conflict once it ripens.

In the end, the parties and the public can rest assured that this court's judges have done their duty, and they have done it out in the open. The supermajority has owned up to a prior mistake of this court regarding a matter of statutory interpretation, explained the error in detail, and set out an analysis behind this court's decision in this case that is true to the text. A slightly bigger supermajority has closely considered the department's arguments for certification to the supreme court and found no constitutional basis for granting the department's certification request. There is nothing more to our denial of the motion than that.

ROWE, C.J., and ROBERTS, RAY, OSTERHAUS, WINOKUR, JAY, M.K. THOMAS, NORDBY, and LONG, JJ., concur.

B.L. THOMAS, J., concurs with an opinion in which ROWE, C.J., and ROBERTS, OSTERHAUS, and WINOKUR, JJ., join.

LEWIS and KELSEY, JJ., concur in result only.

MAKAR, J., dissents with an opinion in which BILBREY, J., joins.

B.L. THOMAS, J., concurring in the denial of certification.

I concur in the Court's opinion denying the Department's motion for certification. I write separately to address Judge Makar's opinion dissenting from our denial of the motion, as that opinion includes what I consider to be three incorrect assertions regarding the decision of thirteen judges to deny the motion. I also disagree with Judge Makar's dissenting opinion on the merits of the motion.

First, I am confident that not one of Judge Makar's thirteen colleagues who disagreed with his view of the motion have "ignor[ed]" the motion. I have full faith in my colleagues that they read the motion, evaluated its merits, and made a thoughtful decision, including the two colleagues with whom I disagree.

Second, I am equally confident that not one of the thirteen colleagues who voted to deny the motion "feigns that this case's impact is no big deal[."] This is easily disproven by the simple fact that this Court chose to hear this case en banc.

Finally, this Court did not fail to "acknowledge what it has done." We reversed a prior incorrect panel decision which incorrectly held that the Department of Corrections could refuse to consider a statutorily awarded reduction of up to a maximum of fifteen percent of the total sentence of a state prisoner who had not been convicted of a violation of section 794.011, Florida Statutes, but rather, was convicted of an attempted crime as defined under section 777.04(1), Florida Statutes. Our en banc majority decision correctly interpreted section 944.275(4)(e), Florida Statutes, to hold that persons convicted of a violation of section 777.04(1) could not be excluded from consideration for incentive gain-time due to the undeniable fact that such offenders had not been convicted of a violation of section 794.011. We analyzed the relevant statutes at length and certainly did not fail to acknowledge the precise legal question at issue and the correct resolution.

Judge Makar states that this Court should certify this case to the Florida Supreme Court because certification "can be a show of confidence rather than infirmity" should the supreme court agree with our en banc decision. But as we stated recently, "[t]he supreme court has warned district courts about using certification merely for the purpose of seeking its approval of a decision." *Vickery v. City of Pensacola*, No. 1D19-4344, 2022 WL 480742, at *18 (Fla. 1st DCA Feb. 16, 2022) (opinion on motion for rehearing, clarification, rehearing en banc, and certification of questions of great public importance). In *Owens-Corning Fiberglas Corp. v. Ballard*, the supreme court surmised that a certified question "appears to be more of a request for our approval of the conclusion reached by the court below than an issue involving great public importance." 749 So. 2d 483, 485 n.3 (Fla. 1999). "In most cases we

would discourage district courts from asking for this kind of check on its decision as a question of great public importance." *Id.* This admonishment applies here. Certification does not exist for the supreme court to "check" our decisions or to affirm our confidence in our own opinions.

The majority also correctly denies the motion to certify conflict on the merits because there is no conflict with another district court's decision. The Florida Constitution states that the supreme court may review a decision of a district court that "*directly conflicts* with a decision of another district court of appeal . . . on the *same question of law"* or is certified by that district court "to be in *direct conflict* with a decision of another district court of appeal." Fla. Const. art. V, § 3(b)(3)–(4) (emphasis added). The Fifth District cases that Appellant and Judge Makar state are in conflict with our en banc decision all involve whether an offender can be subject to certain sex-offender *probationary terms*, not incentive gain-time consideration under section 944.275(4)(e), Florida Statutes. The supreme court has made clear that purported conflict between cases addressing "two distinct situations" with different "factual circumstances" does not invoke its jurisdiction to hear a case, even when conflict *was certified* by the district court. *State v. Lovelace*, 928 So. 2d 1176, 1177 (Fla. 2006). As this case addresses different legal issues than those addressed by the Fifth District cases, there is no conflict.

Furthermore, our adherence to the text in this case addresses the criminal-attempt statute and does not address a legislative policy enacted to exclude offenders convicted of *completing* the commission of a designated offense such as sexual battery. In fact, that is why the Legislature generally provides more lenient punishment for attempted crimes both in terms of sentence and, as here, in declining to exclude those offenders who attempt, but do not complete, certain felony crimes from consideration for incentive gain-time. Section 777.04(4)(a)–(f), Florida Statutes, provides that "the offense of criminal attempt" shall be ranked one level below the offense attempted for the purposes of sentencing under chapter 921, and most significantly here, reduces almost *every* felony and misdemeanor degree by one degree below the substantive offense attempted, including even capital crimes.

This statutory leniency for the punishment of the "offense of criminal attempt" does not exclude the attempted offense at issue here, although the statute does provide other specified exceptions. The logic, morality, and intended prevention of social evils of this legislative policy of leniency for attempted offenses is easy to discern: if the law fails to provide leniency for an attempted offense, an offender could decide to commit the completed crime, understanding that to engage in additional criminal conduct and inflict more pain or death on a victim does not incur additional punishment. Thus, the lack of this legislative policy would actually impose greater suffering and death on victims of crime. This explains why the legislative history of this more-lenient treatment of the offense of criminal attempt was established almost a half-century earlier, and that legislation amended earlier legislation providing for even-more lenient punishment for the "offense of criminal attempt." *See* Ch. 74-383, § 12, Laws of Fla. Significant here, section 777.04(a) further directs that the policy of sentencing leniency must be considered in "*determining incentive gain-time eligibility* . . . ." (emphasis added).

Thus, I concur in the Court's correct decision denying the motion to certify conflict or a question of great public importance.

ROWE, C.J., and ROBERTS, OSTERHAUS, and WINOKUR, JJ., concur.

MAKAR, J., dissenting from denial of certification.

The Florida Department of Corrections, assisted by the Office of the Solicitor General, makes a most modest request, which is to certify that the sua sponte en banc decision in this case—reversing over two decades of district precedent—conflicts with cases of the Fifth District Court of Appeal that relied on the now forsaken precedent. *See* Art. V, § 3(b)(4), Fla. Const. (supreme court "[m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal."). The same is true as to the Department's request for a certified question of great public importance.

Regarding the former, it is a minimal ask. As the Solicitor General notes, irreconcilable conflict now exists because the Fifth

District cases had adopted and relied upon the decisions abandoned in *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001) and *Zopf v. Singletary,* 686 So. 2d 680 (Fla. 1st DCA 1996), making it glaringly obvious that a newborn conflict was created. ("In deciding to hear this case en banc and overruling *Wilcox* and language in *Zopf*, the majority acknowledged that its holding conflicted with those precedents, and thus necessarily also with the Fifth District's decisions adopting them."). As an example, the Solicitor General points out that the majority's holding "is in direct conflict with the Fifth District's decisions: In this district, an attempted sexual offense is an offense under the attempt statute, while in the Fifth District an attempted sexual offense is an offense under the substantive sexual offense statute." Conflict of this sort cries out for resolution.

Plus, when an appellate court overturns over two decades of its precedent—cases that another district has adopted and a critical executive branch agency has followed in its decision-making—the court ought to acknowledge what it has done, certify conflict, and allow for per se supreme court jurisdiction. *State v. Vickery,* 961 So. 2d 309, 312 (Fla. 2007) (noting "that a certification of conflict provides us with jurisdiction per se"). After all, the supreme court might agree with the majority and thereby resolve the conflict in its favor; certification can be a show of confidence rather than infirmity. At the least, certification gives the supreme court jurisdictional license—after full briefing by the affected parties and governmental agencies—to provide guidance to the districts on how the legal questions presented are to be resolved prospectively on a uniform statewide basis. Absent supreme court review, conflict persists and incongruent outcomes result; not good.

The failure to certify conflict, of course, does not preclude the Department from seeking discretionary review by persuading the supreme court that "express and direct" conflict jurisdiction exists. *See* Art. V, § 3(b)(3), Fla. Const. (supreme court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law."). The supreme court is likely to accept review on this basis, demonstrating why certification by this Court ought to be done as a matter of course

and expediency, thereby relieving the Department and the supreme court from unnecessarily devoting even more resources to the question of whether "conflict" exists for jurisdictional purposes; it clearly does. And the conflict exists whether a case involves gain-time or probation matters; the Fifth District's reliance on the now-jettisoned legal reasoning in *Wilcox, Zopf*, and related cases, is the crux of the conflict. The important point is that the underlying substantive legal issues need to be resolved by the supreme court so that every Florida court and every affected state and local agency and official have a common understanding of the legal playing field when it comes to what constitutes attempted crimes and prison release determinations.

For this reason, the request for certification of a question of great public importance ought to be granted as well. As the Solicitor General notes, critical legal issues of statewide importance are presented, and substantial arguments advanced, making it necessary that the confusion created by this case be eliminated. It can't be feigned that this case's impact is no big deal; the potential for those who attempt to sexually assault minors to obtain early release is more than mere esoterica affecting a mere handful of felons. As the Department points out, the Court's en banc decision "could result in substantially shorter sentences for approximately 482 inmates currently serving time for attempted sexual battery[,]" including "retroactive incentive gain-time that under the [en banc Court's] decision should have been earned from 2014 onwards." Stated succinctly, "because of this Court's decision, nearly five hundred inmates convicted of a sexual offense could be entitled to earlier release from incarceration." Not to mention the en banc decision's broader impact in destabilizing the law of attempt generally, which can't be quantified, but is substantial in scope and practical impact.

Plus, ignoring a modest and respectful request for a certified question from the executive branch of government is ill-advised, particularly when an important part of what the Department does is to serve the citizenry by protecting public safety; the same is true as to the prosecutors, public defenders, and trial judges, who need less legal confusion in the daily performance of their jobs. As such, I would grant the Department's request to certify conflict with the Fifth District and to certify a question of great public

importance as phrased by the Department (i.e., "Whether inmates convicted of attempted sexual battery are eligible for incentive gain-time under section 944.275(4)(e), Fla. Stat."). The supreme court, of course, is free to rephrase this question to encompass other important issues presented in this case. This case was initially a run-of-the-mill case, deserving a perfunctory disposition, but the en banc decision has altered the legal landscape, creating an urgent need for supreme court review.

BILBREY, J., concurs.

Lance E. Neff, General Counsel; Beverly Brewster, Assistant General Counsel, and Mark S. Urban, Deputy General Counsel, Florida Department of Corrections, Tallahassee; and Ashley Moody, Attorney General, and Sheron Wells and Kristin J. Lonergan, Assistant Attorneys General, Tallahassee; Henry C. Whitaker, Solicitor General, Jeffrey Paul DeSousa, Chief Deputy Solicitor General, and Christopher J. Baum, Senior Deputy Solicitor General, Miami, for Appellant.

Terrence E. Kehoe, Orlando, for Appellee.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing appendix has been furnished via the E-Filing Portal on this 23rd day of September, 2022, on all parties required to be served, including counsel for Respondent:

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