SC22-1207

In the Supreme Court of Florida

FLORIDA DEPARTMENT OF CORRECTIONS,
Petitioner,

v.

MCMILLAN C. GOULD,
Respondent.

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

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE ISSUE

As part of legislation that increased the penalties available for various sexual offenses, the Legislature specified in Section 944.275(4)(e) that the Florida Department of Corrections "may not grant incentive gain-time if the offense is a violation of . . . s. 794.011 [or] s. 800.04"—statutes that punish sexual battery, lewd and lascivious battery, and lewd and lascivious molestation. Respondent McMillan Gould is in prison for attempted sexual battery. Consistent with longstanding prosecutorial practice and decades of judicial opinions, Respondent's charging document alleged that he committed attempted sexual battery in "violation of" *both* Section 794.011 and the generic attempt statute, Section 777.04. Over the dissent of three judges, the en banc First District held that Respondent was nevertheless eligible for incentive gain-time because his offense was not "a violation of" Section 794.011.

The question here is whether an inmate convicted of attempted sexual battery committed "a violation of . . . s. 794.011" and is thus ineligible for incentive gain-time under Section 944.275(4)(e).

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STATEMENT OF THE CASE AND FACTS

A. Legal background

Most prisoners in the Florida Department of Corrections' custody are eligible for incentive gain-time, which authorizes sentence reductions to encourage good behavior. *See* § 944.275(4)(b)3., Fla. Stat. 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* § 944.275(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").

In 2014, however, as part of a bill that made "significant changes to the punishment of sex offenders," the Legislature "eliminat[ed]" incentive gain-time eligibility for certain offenders. CS/SB 526 Bill Analysis & Fiscal Impact Statement, at 1 (Jan. 13,

2014).[1] It accomplished that by adding Section 944.275(4)(e), which provides that for recent offenses (2014 to present), the Department "may not grant incentive gain-time if the offense is a violation of . . . s. 794.011 [or] s. 800.04"—statutes criminalizing sexual battery and lewd and lascivious conduct.[2]

B. Facts and procedural history

Respondent McMillan Gould was charged with engaging 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." R.41, R.42. In 2016, Respondent was convicted, and the final judgment states that he was adjudicated guilty of attempted

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[1] *Available at* https://www.flsenate.gov/Session/Bill/2014/526/Analyses/2014s0526.cj.PDF.

[2] Section 944.275(4)(e) provides in full:

> (e) Notwithstanding subparagraph (b)3., for sentences imposed for offenses committed on or after October 1, 2014, the department may not grant incentive gain-time if the offense is a violation of s. 782.04(1)(a)2.c.; s. 787.01(3)(a)2. or 3.; s. 787.02(3)(a)2. or 3.; s. 794.011, excluding s. 794.011(10); s. 800.04; s. 825.1025; or s. 847.0135(5).

sexual battery under Sections 794.011(2)(a) and 777.04. R.16. The trial court sentenced him to twenty-five years in prison. R.45.

Upon becoming aware that he was being denied incentive gain-time, Respondent exhausted his administrative remedies and then sued the Department, seeking a writ of mandamus requiring the Department to consider him eligible for incentive gain-time under Section 944.275(1). R.11. In his view, he was convicted under the generic attempt statute, Section 777.04, not under Section 794.011, a disqualifying statute listed in Section 944.275(4)(e). R.14. The trial court agreed, concluding that Respondent "is a person convicted as an attempted sexual batterer; he has not been convicted of sexual battery," and Section 944.275(4)(e) does not "mention a conviction for attempted sexual battery." R.63, R.66. The trial court therefore granted a writ requiring the Department to "consider [Respondent] as eligible for gain time and to award him any and all gain time which he should have earned for time served to date." R.67.

The Department sought appellate review, and the case was fully briefed by June 2019. Nearly three years later, the First District sua sponte decided to hear the case en banc in the first instance, without

soliciting further briefing or argument from the parties.[3] It heard the case en banc to recede from an earlier en banc precedent, *Wilcox v. State*, 783 So. 2d 1150 (Fla. 1st DCA 2001) (en banc). There, the defendant had been convicted of attempted capital sexual battery. 783 So. 2d at 1150. The trial court had imposed conditions of probation permissible only for those "placed under supervision for violation of chapter 794" and several other statutes. § 948.03(5)(a), Fla. Stat. (1998). The defendant argued that "attempted capital sexual battery is an offense under" the attempt statute, Section 777.04, not Chapter 794. *Wilcox*, 783 So. 2d at 1150. The First District rejected that argument, holding that "attempted capital sexual battery is an offense under chapter 794, Florida Statutes," because "attempted sexual battery is a crime under section 794.011(2), Florida Statutes, as modified by the attempt statute, section 777.04, Florida Statutes." *Id.* at 1150–51 (cleaned up).

[3] Although the Department sought second-tier appellate review in the form of certiorari, the First District treated the Department's petition as a request for plenary appellate review of the trial court's order granting mandamus relief. R.233.

Below, however, the First District concluded that "*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." R.235. Respondent's conviction for attempted sexual battery, it explained, was not "a violation of" Section 794.011 (the sexual battery statute) but only a violation of Section 777.04 (the generic attempt statute)—according to the First District, he "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." R.240. As a result, the First District held, "section 944.275(4)(e) does not render [Respondent] ineligible for incentive-gain-time consideration," and the court affirmed the trial court's grant of a writ of mandamus. *Id.* Judge Makar and Judge Bilbrey issued dissenting opinions, joined by Judge Kelsey.

The Department moved to certify a conflict and a question of great public importance. The en banc court denied that motion, and Judges Makar and Bilbrey again dissented. *Fla. Dep't of Corrs. v. Gould*, 344 So. 3d 496, 520, 524 (Fla. 1st DCA 2022). The

Department then timely filed a notice to invoke this Court's discretionary jurisdiction.

The Department moved to stay the mandate while it sought this Court's review. In that motion, the Department explained that approximately 540 inmates in the Department's custody were convicted of attempted sexual battery. If the First District's decision stands, all or most of those 540 inmates will be awarded incentive gain-time, including retroactive incentive gain-time from 2014 onwards. If left standing, the decision promises to have severe prospective effects on future sentences. The availability of incentive gain-time can substantially decrease an inmate's sentence: Offenders can earn 10 days of incentive gain-time per month, § 944.275(4)(b)3., Fla. Stat., up to a maximum of 15% of the inmate's total sentence, *id.* § 944.275(4)(f). But on September 20, 2022, the en banc First District denied that motion as well[4] and the mandate then issued.

[4] Judges Makar, Bilbrey, and Kelsey dissented from the denial of the stay motion.

The Department then moved to recall and stay the mandate, and this Court granted that motion on November 22, 2022. On December 1, 2022, the Court accepted jurisdiction.

SUMMARY OF ARGUMENT

This case presents the question whether an offender is eligible for incentive-gain time under Section 944.275(4)(e) if the offender has attempted to violate a statute when "a violation of" that statute would render him ineligible for incentive-gain time. The answer is no.

I. In 2014, when the Legislature prohibited certain sex offenders from being eligible for incentive gain-time, it was well understood by both courts and prosecutors that attempt offenses constituted "a violation of" the underlying substantive statute. Courts had repeatedly said so, and prosecutors charged attempt offenders under both the attempt statute and the substantive statute. Thus, under ordinary principles of statutory interpretation, the Court should presume that when the Legislature used this term of art in delineating who would be ineligible for incentive gain-time, it captured attempt offenders as well.

II. "Attempt," moreover, is not a standalone crime. Instead, attempt offenses are codified in both the attempt statute and the underlying substantive statute. Consequently, attempt offenders commit "a violation of" both the attempt statute and the underlying substantive statute. In fact, it is not even possible to calculate an attempt offender's punishment without determining which underlying substantive statute was violated.

III. The Department's interpretation of Section 944.275(4)(e) is consistent with the Legislature's intent to increase the severity of punishments for sex offenders. Nothing indicates that the Legislature intended to provide additional leniency to attempt offenders by allowing them to be eligible for incentive gain-time. Instead, given that sexual offenders recidivate at a high rate, the Legislature intended to protect the public by ensuring that even attempted sexual offenders serve their full sentences.

STANDARD OF REVIEW

"Because this matter involves a legal determination based on undisputed facts, this Court's standard of review is de novo." *Allen v. State*, 324 So. 3d 920, 925 (Fla. 2021).

ARGUMENT

Section 944.275(4)(e) safeguards the public by ensuring that dangerous sexual offenders serve their entire sentences. That law provides that for recent offenses, the Department "may not grant incentive gain-time if the offense is a violation of . . . s. 794.011 [or] s. 800.04"—statutes criminalizing sexual battery and lewd and lascivious conduct. This case turns on whether attempted sexual battery is an "offense [that] is a violation of . . . s. 794.011 [or] s. 800.04." For the reasons discussed below, it is.

I. THE PHRASE "A VIOLATION OF," AS USED IN SECTION 944.275(4)(E), IS A TERM OF ART THAT SHOULD BE ACCORDED THE TECHNICAL MEANING IT ACQUIRED BY THE TIME THAT LAW WAS ENACTED.

The First District believed that attempted sexual battery was not "a violation of" Section 794.011 because, within the ordinary meaning of that phrase, "a perpetrator's failure to complete the crime defined means that he has not violated the statute defining it." R.238. At the outset, that overlooks that "a violation of" is a legal term of art with a settled meaning in criminal statutes; a meaning the Legislature was familiar with when it enacted Section 944.275(4)(e). That term of art encompasses attempts.

The meaning of a statutory term "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Conage v. United States*, 346 So. 3d 594, 598 (Fla. 2022) (cleaned up). Courts therefore "must exhaust all the textual and structural clues that bear on the meaning of a disputed text." *Id.* (cleaned up).

Generally, courts presume that an undefined statutory term "bears its ordinary meaning." *Id.* at 599. That is not true, however, with terms of art. *See* Scalia & Garner, Reading Law: The Interpretation of Legal Texts 73–75 (2012) (describing "terms of art" as an "exception" to the ordinary-meaning canon). Instead, "when the words in a statute are technical in nature and have a fixed legal meaning, it is presumed that the Legislature intended that the words be given their technical meaning." *Headley v. City of Miami*, 215 So. 3d 1, 9 (Fla. 2017) (citing 48A Fla. Jur. 2d Statutes § 135 (2014)); *see* 48A Fla. Jur. 2d Statutes § 135 ("[T]echnical words and phrases that have acquired a peculiar and appropriate meaning in law cannot be presumed to have been used by the legislature in a loose, popular sense.").

Put differently, "legal terms can take on an expected, ordinary meaning among the experienced audience to which such terms are addressed." *Fla. Highway Patrol v. Jackson*, 288 So. 3d 1179, 1183 (Fla. 2020); *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578, 579 n.2 (Fla. 1984) ("Terms of special legal significance are presumed to have been used by the legislature according to their legal meanings."). "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947); *see also Taggart v. Lorenzen*, --- U.S. ---, 139 S. Ct. 1795, 1801 (2019) (describing and relying on this "longstanding interpretive principle"); *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 115 (2011) (Thomas, J., concurring) ("'[W]here Congress borrows terms of art,' this Court presumes that Congress 'knows and adopts the cluster of ideas that were attached to each borrowed word . . . and the meaning its use will convey to the judicial mind.'" (citation omitted)).

Here, by the time Section 944.275(4)(e) was enacted in 2014, the term "a violation of" had long since acquired a technical legal

meaning "among the experienced audience to which [the] terms [were] addressed," *Jackson*, 288 So. 3d at 1183, including both the judiciary and the executive branch.

For decades, courts had described attempt offenses as involving "a violation of" the substantive offense statute. And they had done so repeatedly in the context of the crime at issue here: attempted sexual battery. In fact, just months before the Legislature added the phrase "a violation of" to the statute in 2014, the Fifth District had explained that "attempted sexual battery is an offense under the sexual battery statute." *State v. Fureman*, 161 So. 3d 403, 407–08 (Fla. 5th DCA 2014). It further explained that although the defendant entered an open plea to attempted sexual battery, his "offense is in violation of section 800.04." *Id.* at 408.

And since the late 1980s, court after court (including the First District) had referred to attempted sexual battery as a "violation of" Section 794.011. *E.g.*, *Mizner v. State*, 154 So. 3d 391, 395 (Fla. 2d DCA 2014); *Partch v. State*, 43 So. 3d 758, 759, 763–64 (Fla. 1st DCA 2010); *Erwin v. State*, 983 So. 2d 58, 58 (Fla. 1st DCA 2008); *Brock v. State*, 954 So. 2d 87, 88 (Fla. 1st DCA 2007); *Mendez v. State*, 798

So. 2d 749, 750 (Fla. 5th DCA 2001); *Guinto v. State*, 693 So. 2d 46, 48 (Fla. 4th DCA 1997); *Holland v. State*, 681 So. 2d 308, 308 (Fla. 5th DCA 1996); *Velasquez v. State*, 657 So. 2d 1218, 1218–19 (Fla. 5th DCA 1995); *Perry v. State*, 593 So. 2d 620, 620 (Fla. 2d DCA 1992); *Stermer v. State*, 567 So. 2d 13, 14 (Fla. 2d DCA 1990); *Wise v. State*, 546 So. 2d 1068, 1068 (Fla. 2d DCA 1989); *Beasley v. State*, 518 So. 2d 917, 917 (Fla. 1988); *see also Prentice v. State*, 319 So. 3d 57, 62 (Fla. 4th DCA 2021); *McCarron v. State*, 185 So. 3d 666, 667 (Fla. 2d DCA 2016).

Courts have also consistently interpreted the phrase "a violation of" to include attempts in the context of the sex-offender probation statute. *See*, *e.g.*, *Fureman*, 161 So. 3d at 407–08; *Long v. State*, 158 So. 3d 580, 580 (Fla. 2d DCA 2014); *Williams v. State*, 126 So. 3d 1063, 1063 (Fla. 2d DCA 2013); *Hotaling v. State*, 88 So. 3d 942, 942 (Fla. 2d DCA 2012); *Ream v. State*, 843 So. 2d 309, 309 (Fla. 5th DCA 2003); *Donovan v. State*, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002); *State v. Thurman*, 791 So. 2d 1228, 1230 (Fla. 5th DCA 2001).

The Legislature was thus aware of how Florida courts construed the phrase "a violation of" in the context of criminal attempts. *See*

Scott v. Williams, 107 So. 3d 379, 387–88 (Fla. 2013) (interpreting statute against the "backdrop of precedent"); *cf. Bush v. Schiavo*, 885 So. 2d 321, 324 (Fla. 2004) (explaining that procedural history was important because it provided the "backdrop to the Legislature's enactment" of statute at issue).

The Legislature was also acting against the backdrop of the executive branch's consistent practice. Prosecutors have long filed attempted sexual battery charges via charging documents describing attempts as constituting a "violation" of *both* the attempt statute and the sexual-battery statute, including in this very case. R.41 (information charging that Petitioner "did, in violation of Florida Statutes 794.011(2)(a) and 777.04, attempt to commit a sexual battery upon . . . a person less than 12 years of age"); R.249 (Makar, J., dissenting) (explaining that "[t]ime-honored and customary charging documents and judgments used statewide recognize and reflect this principle").[5]

[5] The First District pointed out below that this charging practice is required by due process, and therefore that prosecutors' compliance with it did not "equate with treatment of a violation of the

The Legislature thus "obviously transplanted" the phrase "a violation of" from these prosecutorial charging practices and the case law discussed above, and so the "old soil"—the technical legal meaning that includes attempt offenses—comes with it. Frankfurter, 47 Colum. L. Rev. at 537. On that basis alone, the First District erroneously held that Petitioner is eligible for incentive gain-time.

II. BECAUSE "ATTEMPT" IS NOT A STANDALONE CRIME, ATTEMPTED SEXUAL BATTERY IS "A VIOLATION OF" BOTH THE ATTEMPT STATUTE AND THE SEXUAL BATTERY STATUTE.

Quite apart from the judicial and executive understanding of the phrase "a violation of" in interpreting the statute, an attempt offense is not a "standalone crime"; it is "a violation of" both the attempt statute and the underlying substantive statute. As a result, attempted sexual battery constitutes "a violation of" Section 794.011. Examining the First District's contrary conclusion helps to make this clear.

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criminal attempt statute with violation of the underlying, uncompleted offense." R.239 n.8. But the Legislature knew that attempt offenders *must* be charged with a "violation" of the underlying statute when it added Section 944.275(4)(e), and the Court should therefore conclude that the use of the phrase "a violation of" was intended to capture attempt offenses.

Instead of asking what the Legislature meant in Section 944.275(4)(e) for someone to commit an offense that is "a violation of" Section 794.011, the First District analyzed whether Section 777.04(1) sets forth "a standalone crime." R.240. The court therefore focused on the text of the *attempt statute* and concluded that "criminal attempt [is] an offense separate from the offense attempted." R.236; *see also* R.283 (explaining that the court had sought to "correct a glaring error . . . 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"). As a result, the court reasoned, a defendant convicted of attempted sexual battery had not committed "a violation of" Section 794.011 but only of Section 777.04(1).

The starting point of the First District's analysis, however, was wrong. The question is not what the Legislature meant to do in enacting the *attempt statute* but which offenders the Legislature intended—in 2014—to prohibit from receiving incentive gain-time. And as discussed above, the Legislature enacted Section 944.275(4)(e) against a well-understood backdrop of what it meant to

be "a violation of" Section 794.011, while at the same time significantly increasing punishments for sexual offenders more generally. Thus, the First District's extended discussion of whether Section 777.04(1) was intended to "modify" other criminal offense provisions is beside the point.

In any event, that discussion led the First District to a flawed conclusion: that Section 777.04 "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." R.240.[6] But

[6] In concluding that attempt is a "standalone crime," the First District made much of the fact that the Legislature has, in many instances, equated attempts with the underlying substantive offense in substantive offense statutes themselves. R.236–37. For example, someone who "votes or attempts to vote a fraudulent ballot" commits a felony. § 104.16, Fla. Stat. None of the examples cited by the First District, however, provide that such attempts are "a violation of" the substantive statute. *See* R.236 n.7. They are therefore not "examples that demonstrate [the Legislature] knows how to specify when it wants an attempt to be an offense in violation of a provision other than section 777.04." R.236. Instead, they are better understood as representing a legislative judgment that attempts to commit those specified offenses should be punished the same as completed offenses. *See* § 777.04(4)(a), Fla. Stat. (providing that those convicted under the criminal attempt statute receive punishments one step below the punishment for the substantive offense).

"[t]here is no such crime as bald attempt; it must be attempt *to commit some other crime*." *United States v. Resendiz-Ponce*, 549 U.S. 102, 115 (2007) (Scalia, J., dissenting).[7] A court cannot calculate the punishment for a conviction under the attempt statute without referring to the underlying offense attempted. *See* § 777.04(4). And the offense-severity ranking chart in the Criminal Punishment Code, Section 921.0022, does not even include the attempt statute.

Indeed, in a case decided shortly before Section 944.275(4)(e) was enacted, this Court made clear that the crime of an attempt to violate a substantive criminal statute is codified not only in Section 777.04(1) but also in the substantive criminal statute itself. In other words, the offense is "a violation of" *both* statutes.

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[7] *See also* Thomas Gardner & Victor Manian, *Criminal Law: Principles, Cases and Readings* 73 (1980) ("Attempt, conspiracy and solicitation cannot be charged alone but must be charged as an attempt or conspiracy to commit another crime."); Douglas N. Husak, *Reasonable Risk Creation and Overinclusive Legislation*, 1 Buff. Crim. L. Rev. 599, 602–03 (1998) ("No offense of attempt, conspiracy, or solicitation exists per se. To charge a defendant with having committed one of these inchoate offenses presupposes an object offense that is attempted, solicited, or is the object of the conspiracy.").

In *Coicou v. State*, 39 So. 3d 237 (Fla. 2010), the Court considered whether attempted second-degree murder was a permissive lesser-included offense of attempted felony murder. In so doing, the Court had to analyze where the elements of attempted second-degree murder were located. The Court explained that while attempted felony murder was codified in Section 782.051, "[t]he 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," and thus in analyzing the elements of attempted second-degree murder the Court would look to both statutes. *Id.* at 241.[8]

More recently, in *Weatherspoon v. State*, 214 So. 3d 578 (Fla. 2017), the Court confirmed that attempt offenses are codified in both the attempt statute and the substantive statute. There, the defendant was charged "only with attempted first-degree premeditated murder," but the State sought to proceed under an alternative theory of

[8] Indeed, sections 5.1, 5.2, and 5.3 of the Florida Standard Jury Instructions in Criminal Cases require elements from both the inchoate offense and the object crime.

attempted felony murder. *Id.* at 587. In determining whether the attempted first-degree premeditated murder charge gave the defendant sufficient notice that the State could proceed on an attempted felony murder charge, the Court pointed out 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)." *Id.* at 586; *see also id.* at 586–87 (noting that "citing the statutes," plural, "for the crime of attempted premeditated murder" would not put the defendant on notice of the elements of attempted felony murder).

So while the Legislature has enumerated some crimes in statutes specific to an attempt to commit a particular substantive offense, most attempt crimes are "codified" in *both* the attempt statute *and* the underlying substantive offense.

Below, the First District maintained that *Coicou* and *Weatherspoon* were irrelevant. In its view, that "[o]ne needs to look to both the attempt statute and the underlying offense statute to know what the elements are"—and that the State must "specifically

charg[e] and prov[e] to the jury beyond a reasonable doubt" the "underlying offense that was attempted"—does not mean that an attempt to commit the underlying offense "is actually a violation of the underlying statute." R.241. But in both *Coicou* and *Weatherspoon* the Court identified where an attempt crime was "codified": Attempted second-degree murder is codified in Section 777.04(1) *and* Section 782.04(2), and attempted premeditated murder is codified in Section 777.04(1) *and* Section 782.04. In fact, the First District agreed below that "[t]o 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." R.242; *see also Hurst v. State*, 257 So. 3d 1202, 1204 (Fla. 1st DCA 2018) (holding that a person cannot be convicted of the offense of attempt without necessarily proving the elements of some underlying substantive offense); R.242 (reaffirming *Hurst*).[9]

[9] The First District also argued that in both *Coicou* and *Weatherspoon*, the Court "was addressing offense elements, not the statutory text at issue in this appeal." R.242. That the Court was not addressing the statutory text at issue here does not signify that it did not mean what it said—that the crimes of attempted second-degree

In short, this Court has repeatedly reasoned that an attempt offense is codified in *both* the attempt statute *and* the underlying offense statute. The elements of the attempt offense are defined in *both* the attempt statute *and* the underlying offense statute. To convict someone of an attempt offense, the State must charge a defendant with violating *both* the attempt statute *and* the underlying offense statute. And the State must prove to the jury that the defendant attempted to commit the underlying offense—not merely that the defendant committed "criminal attempt."

Finally, the general penalties statute confirms that an attempt is also "a violation of" the underlying offense statute. Section 775.082(1)(b)1. provides the punishment for an offender under 18 who "actually killed, intended to kill, or attempted to kill the victim and who is convicted under s. 782.04 of a capital felony." *See also* § 775.082(3)(a)5.a., Fla. Stat. (providing punishment for offender

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murder and attempted premeditated murder are codified in both the attempt statute and the murder statute. *Cf.* Fla. R. Crim. P. 3.701, Comm'n notes to 1993 Amends. ("Inchoate offenses are included within the category of the offense attempted, solicited, or conspired to, as modified by chapter 777.").

"convicted under s. 782.04" and who "actually killed, intended to kill, or attempted to kill the victim"). The statute explicitly contemplates the punishment for an offender who only attempted to kill the victim but was "convicted under" the murder statute, Section 782.04—reaffirming that an attempt offender, convicted under the substantive murder statute, has committed "a violation of" the underlying offense statute as well.

That conclusion is confirmed by the First District's decision in *Hurst*, in which the court rejected a version of the argument Respondent advances here. The defendant contended that because he was convicted of attempted first-degree premeditated murder, "he was actually convicted under section 777.04" (the attempt statute), and therefore Section 775.082(3)(a)5.—which applies to defendants "convicted under" Section 782.04—did not apply to him. 257 So. 3d at 1204. The First District rejected that argument, explaining that "the underlying offense committed by Hurst was first-degree premeditated murder under the homicide statute." *Id.*

Put another way, the First District has now concluded that an attempt offender was "convicted under" the substantive offense

statute (*Hurst*) yet also that an attempt offender did not commit "a violation of" the substantive offense statute (*Gould*). Those conclusions are in significant tension.

III. THE DEPARTMENT'S INTERPRETATION OF SECTION 944.275(4)(E) BETTER RESPECTS THE LEGISLATURE'S PURPOSE.

If any doubt as to the proper interpretation remains, the Department's reading of Section 944.275(4)(e) is more faithful to the Legislature's aims in adopting that law. In enacting the legislation that added subsection (4)(e)'s prohibition on incentive gain-time to Section 944.275, the Legislature also significantly increased punishments for sexual offenders, including for those convicted of sexual battery under Section 794.011.[10] Ch. 2014-4, § 3, Laws of Fla. Nothing suggests that the Legislature wanted to exclude defendants convicted of attempting those sexual offenses from those increased

[10] The statutory definitions for "sexual offender" and "sexual predator," meanwhile, expressly include attempt offenders. § 943.0435(1)(h)1.a.(I), Fla. Stat. (defining "sexual offender" as someone who "[h]as been convicted of committing, or attempting, soliciting, or conspiring to commit, any of the criminal offenses proscribed in" listed statutes); § 775.21(4)(a)1.b., Fla. Stat. (setting forth designation of "sexual predator" for someone convicted of "[a]ny felony violation, or any attempt thereof, of" listed statutes).

punishments, including the prohibition on incentive gain-time—which can decrease an inmate's sentence by up to 15 percent. *See Cason v. Fla. Dep't of Mgmt. Servs.*, 944 So. 2d 306, 313 (Fla. 2006) (explaining that a statute's text should be interpreted "consistent with the statute's purpose"). Quite the contrary, by increasing the punishment for the underlying sexual offenses, the Legislature simultaneously increased the punishment for *attempting* those offenses. *See* § 777.04(4), Fla. Stat. (keying the punishment available for attempts to the punishment available for the underlying offense).

Allowing those convicted of attempted sexual offenses to receive incentive gain time, moreover, would result in approximately 540 inmates being eligible for incentive gain-time. But "[t]he risk of recidivism posed by sex offenders is 'frightening and high,'" *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)), and attempted sexual battery offenders are some of the most dangerous in the criminal justice system. Studies have found that 17 percent of sex offenders were convicted of another sex offense within five years of release—with 21 percent reconvicted within ten

years.[11] Indeed, recidivism rates are even higher for subsequent arrests of sex offenders for any type of crime.[12] It is unlikely that the Legislature intended to exclude attempted sexual offenders from Section 944.275(4)(e)'s prohibition in a bill intended to keep sexual offenders off the streets for a longer period of time.

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[11] *See*, *e.g.*, Andrew J.R. Harris & R. Karl Hanson, *Sex Offender Recidivism: A Simple Question* (Pub. Safety & Emer. Prep. Can. 7 (2004), https://www.publicsafety.gc.ca/ cnt/rsrcs/pblctns/sx-ffndr-rcdvsm/sx-ffndr-rcdvsm-eng.pdf (observing that offenders with prior sex-crime convictions were twice as likely to recidivate); *see also* Roger Przybylski, *Adult Sex Offender Recidivism*, *Sex Offender Mgmt. Assessment & Planning Initiative*, Dep't of Just., 107, 111–15, 121 (DOJ 2017), https://smart.gov/SOMAPI/pdfs/SOMAPI_Full%20 Report.pdf ("The observed sexual recidivism rates of sex offenders range from about 5 percent after three years to about 24 percent after 15 years.").

[12] An analysis of over 400,000 state prisoners found that 21 percent of sex offenders were rearrested for a crime within six months of release, 31 percent were rearrested within one year, 44 percent within two years, 51 percent within three years, and 60 percent within five years. Matthew R. Durose et al., *Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010*, Dep't of Just., 8 (2014), https://www.bjs.gov/content/pub/pdf/ rprts05p0510.pdf; *see also* Patrick A. Langan et al., *Recidivism of Sex Offenders Released from Prison in 1994*, Dep't of Just., 2, 13 (2003), https://www.bjs.gov/content/pub/pdf/rsorp94.pdf (24 percent of sex offenders reconvicted of new offense within three years).

What is more, excluding attempt offenders would have "odd consequences that the Legislature could not have intended." R.257 (Bilbrey, J., dissenting). For example, someone convicted of attempted capital sexual battery (a first-degree felony punishable by up to 30 years in prison, §§ 777.04(4)(b); 775.082(3)(b)1., Fla. Stat.) would be entitled to incentive gain-time, while someone convicted of lewd and lascivious conduct under Section 825.1025(4) (a third-degree felony punishable by no more than five years in prison, § 775.082(3)(e), Fla. Stat.) would not be. Surely the Legislature did not view the former offender as more deserving of leniency.

Another potential consequence that the Legislature likely did not intend relates to the standard sex offender probation conditions. Under Section 948.30, if a defendant is convicted of an enumerated sexual offense, the standard sex offender probation conditions contained therein—such as a curfew, limits on where the offender may live or work, submission to warrantless searches, and other statutory conditions—are mandatory and the trial court need not orally pronounce them at sentencing. But if the First District's reasoning were extended to Section 948.30 (which uses the same

phrase "a violation of" and does not expressly list attempt offenses), attempt offenders could be excluded from the mandatory application of those conditions.[13]

One last point: In an opinion concurring in the denial of certification, Judge B.L. Thomas argued that the so-called "legislative policy of leniency for attempted offenses" makes sense because "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." R.288. As a result, argued Judge Thomas, "the lack of this legislative policy would actually impose greater suffering and death on victims of crime." R.288.

That overlooks two things. For one, a defendant always has an incentive to stop short of completing an offense because attempts carry a lower statutory maximum sentence than their corresponding

[13] As Judge Bilbrey noted, "a trial court could still order sex offender probation as a special condition of probation but would have to pronounce the terms." R.258 (citing *Villanueva v. State*, 200 So. 3d 47, 53 (Fla. 2016)).

choate offenses. *See* § 777.04(4)(b)–(d), Fla. Stat. (determining the felony or misdemeanor degree of an attempt by reference to the underlying substantive crime); *id.* § 775.082(3)–(4) (providing for statutory maximum penalties based on degree). In Judge Thomas's view, the Legislature therefore intended to provide leniency twice over by both lowering an attempted sexual batterer's initial sentence and allowing incentive gain-time.[14]

For another, under Section 777.04(5)(a), abandonment is a defense to a charge of criminal attempt; if, "under circumstances manifesting a complete and voluntary renunciation of his or her criminal purpose, the defendant . . . [a]bandoned his or her attempt to commit the offense or otherwise prevented its commission," the defendant will not incur any punishment at all. It is thus not the case that any "legislative leniency" is intended to deter would-be offenders from going through with the offense—that is what the abandonment defense is for.

[14] Or, potentially, *thrice* over if the standard sex offender probation conditions are not mandatory.

* * *

When the Legislature enacted Section 944.275(4)(e), it used a legal term of art, "a violation of," which—when referring to a substantive offense statute—has long been understood by both courts and prosecutors to encompass attempt offenses. And because "attempt" is not a standalone crime, attempt offenders commit "a violation of" both the attempt statute and the underlying offense statute. This interpretation of Section 944.275(4)(e) better aligns with the Legislature's intent in 2014 to increase punishment for sex offenders more generally. Respondent, convicted of attempted sexual battery, is therefore ineligible for incentive gain-time.

CONCLUSION

The Court should quash the First District's decision.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 6th day of February, 2023, on all parties required to be served.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it contains 4,948 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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