SC22-1207

In the Supreme Court of Florida

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

PETITIONER'S 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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STATEMENT OF THE ISSUES

The Fifth District has held that an inmate convicted of attempted sexual battery has committed a violation of the substantive sexual-battery statute (Section 794.011 or Section 800.04), as modified by the generic attempt statute, Section 777.04. The First District, by contrast, has now held that attempted sexual battery is a violation of Section 777.04 alone. The issue is:

Whether inmates convicted of attempted sexual battery are eligible for incentive gain-time under Section 944.275(4)(e), which provides that for recent offenses, 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."

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STATEMENT OF THE CASE AND FACTS

Most prisoners in the Florida Department of Corrections' custody are eligible for incentive gain-time, which authorizes sentence reductions to encourage good behavior. Section 944.275(4)(e), however, 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.

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." App'x 28 (Makar, J., dissenting). Respondent was convicted, and the final judgment states that he was adjudicated guilty of attempted sexual battery under Sections 794.011(2) and 777.04. *Id.* at 28-29. The trial court sentenced him to twenty-five years in prison. App'x 4. He sued the Department, seeking a writ of mandamus requiring the Department to consider him eligible for incentive gain-time under Section 944.275(1). *Id.* at 5. In his view, he was convicted under the generic attempt statute, Section 777.04, not under Section 794.011, the disqualifying sexual-battery statute

listed in Section 944.275(4)(e). *Id.* The trial court agreed and granted the writ. *Id.* at 6.

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 further briefing or argument from the parties. The court affirmed the trial court's grant of a writ of mandamus, holding that Respondent "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." App'x 20. Thus, the court held, "section 944.275(4)(e) does not render [Respondent] ineligible for incentive-gain-time consideration." *Id.* In so holding, the court "recede[d] from [its] previous pronouncement of a plainly incorrect 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) [(en banc)]." App'x 3. Judge Makar and Judge Bilbrey issued dissenting opinions, joined by Judge Kelsey. Judge Makar characterized the decision as "the judicial equivalent of an unprompted cannonball dive into a long-placid wading pool." App'x 32 (Makar J., dissenting).

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*, --- So. 3d ---, No. 1D19-1149, 2022 WL 2092492, at *22 (Fla. 1st DCA Aug. 12, 2022) ("Certification Opinion"). 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, but on September 20, 2022, the en banc court denied that motion as well[1] and the mandate then issued.

SUMMARY OF ARGUMENT

In the Fifth District, attempted sexual battery is a violation of the substantive sexual-battery statute, as modified by the generic attempt statute. But in the First District, attempted sexual battery is a violation only of the generic attempt statute. That irreconcilable conflict has important statewide consequences: Under the First District's decision, hundreds of inmates who have been convicted of attempted sexual battery would be entitled to incentive gain-time

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

(and would thus serve shorter sentences), contrary to the Legislature's intent and decades of precedent.

The First District heard this case en banc in the first instance—sua sponte—without notice to the State that it was considering this remarkable step. Had it not heard the case en banc, it could not have overruled its earlier en banc precedent (on which the Fifth District relied) holding that attempted sexual battery violates the substantive sexual-battery statute. Thus, the conflict here is clear; the issue is plainly important; and the First District's decision was wrong. Review is warranted.

ARGUMENT

I. THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS FROM THE FIFTH DISTRICT.

This Court has jurisdiction under Article V, Section (3)(b) of the Florida Constitution because the First and Fifth Districts expressly disagree on a question of law that is dispositive here: Whether attempted sexual battery is an offense under the substantive sexual-battery statute (Section 794.011 or Section 800.04), as modified by the generic attempt statute, or under the generic attempt statute alone (Section 777.04). Respondent's entitlement to incentive gain-

time under Section 944.275(4)(e) turns solely on the answer to that question.

1. In the decision below, the First District held that Respondent's conviction for attempted sexual battery was not a "violation of" Section 794.011 (the sexual battery statute) but only a violation of Section 777.04 (the generic attempt statute)—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." App'x 20. Yet in the Fifth District, "attempted sexual battery is an offense under the sexual battery statute." *State v. Fureman*, 161 So. 3d 403, 407-08 (Fla. 5th DCA 2014); *see also Donovan v. State*, 821 So. 2d 1099, 1102 (Fla. 5th DCA 2002); *State v. Thurman*, 791 So. 2d 1228, 1230 (Fla. 5th DCA 2001). That direct conflict gives this Court jurisdiction. *See* App'x 31 (Makar, J., dissenting) (the decision "create[d] conflict with other districts"); App'x 37 (Bilbrey, J., dissenting) (the decision below "creat[ed] conflict with the Fifth District").

2. That the decision below conflicts with the Fifth District's decisions is evident for another reason. The Fifth District's decisions holding that attempted sexual battery is an offense under the substantive sexual-battery statute (rather than merely the attempt

statute) relied on an older First District decision—and the en banc First District below concluded that it was necessary to overturn *that* decision to reach its result. Some background is helpful.

In *Wilcox v. State*, the defendant was convicted of attempted capital sexual battery. 783 So. 2d 1150 (Fla. 1st DCA 2001) (en banc). The trial court imposed conditions of probation permissible only for those "placed under supervision for violation of chapter 794" and several other statutes. § 948.03, 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).

Shortly afterwards, the Fifth District followed suit. In *Thurman*, the court "agree[d] with *Wilcox* that it was not improper for the trial court to subject" the defendant, convicted of an attempted sexual offense, "to sex offender probation conditions." 791 So. 2d at 1230.

In *Donovan*, again relying on *Wilcox*, the Fifth District concluded that the trial court properly imposed sex offender probation conditions on a defendant convicted of attempted sexual battery. 821 So. 2d at 1102. Finally, in *Fureman*, the court held that the trial court erred in refusing to impose sex offender probation conditions on a defendant convicted of attempted sexual battery, because "attempted sexual battery is an offense under the sexual battery statute." 161 So. 3d at 407-08.

Below, the First District receded from *Wilcox* and "the stated legal principle that drove the result in *Wilcox*." App'x 14. The court 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." *Id.* at 15. In other words, the First District heard this case en banc initially to recede from *Wilcox*—a unanimous en banc decision—"to maintain clarity about the nature of the offense of criminal attempt in this district." *Id.* at 14. If the decision below did not conflict with *Wilcox* (and therefore the Fifth District's decisions), the en banc proceeding, and the decision to overturn *Wilcox*, would have been unnecessary. *See* Certification

Opinion, 2022 WL 2092492, at *20 (explaining that the "current en banc majority has receded from [*Wilcox*] and reached a different conclusion").

To recap: In *Wilcox*, the First District had held that attempted sexual battery is a violation of Section 794.011 as modified by the attempt statute; relying on *Wilcox*, the Fifth District held several times that attempted sexual battery is a violation of the substantive sexual-battery statute (Section 794.011 or Section 800.04); and below, the First District overruled *Wilcox* and held that attempted sexual battery is a violation of the attempt statute, *not* the substantive sexual-battery statute (here Section 794.011). So in the First District, an attempted sexual battery is not an offense under Section 794.011, while in the Fifth District it is. "Conflict of this sort cries out for resolution." Certification Opinion, 2022 WL 2092492, at *22 (Makar, J., dissenting).

3. In denying the Department's motion to certify a conflict, the First District incorrectly concluded that no certifiable conflict exists. In its view, its decision was "based on an application of the criminal attempt statute and the incentive gain-time statute," while the Fifth District's decisions "all had to do with a separate statute governing

sex offender probation."[2] Certification Opinion, 2022 WL 2092492, at *20.

But the First District sliced the bologna too thin by focusing on the fact that different statutes were involved. The underlying question of law—squarely addressed by both Districts—is central to the statutory-interpretation question regardless of whether the case involves Section 948.03, Fla. Stat. (1998) (as in the Fifth District) or Section 944.275(4)(e) (as below). The answer to that question—whether attempted sexual battery violates the substantive sexual-battery statute—resolves the statutory-interpretation question in either case. That was why "receding from *Wilcox*," which "addressed a different statute"—the sex offender probation statute, Section 948.03—was "necessary" here; otherwise, "the stated legal principle that drove the result in *Wilcox* would otherwise be applicable to nearly identical statutory language." App'x 14; *compare* § 948.03,

[2] The court also concluded that *Wilcox*, and the Fifth District's decisions relying on *Wilcox*, "for the most part just pronounced, without legal analysis," that attempted sexual battery violates the substantive sexual-battery statute. Certification Opinion, 2022 WL 2092492, at *20. But it is clear from the face of the opinion below and the Fifth District's opinions that the courts disagree on that central question.

Fla. Stat. (1998) ("violation of chapter 794"), *with id.* § 944.275(4)(e) ("violation of . . . s. 794.011 [or] s. 800.04"). Thus, the differing answers to that question in the First and Fifth Districts represent an "irreconcilable conflict." Certification Opinion, 2022 WL 2092492, at *22 (Makar, J., dissenting).

For these reasons, conflict jurisdiction under Article V, Section 3(b)(3) of the Constitution exists.

II. THE COURT SHOULD EXERCISE ITS DISCRETION AND ACCEPT JURISDICTION.

The Court should exercise its discretion and accept jurisdiction because this case is exceptionally important and because the decision below is wrong.

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 become eligible for incentive gain-time, including retroactive incentive gain-time from 2014 onwards.[3] The decision promises to have severe prospective

[3] Inmates released while this case remains pending will accrue time served. *See Gaines v. Fla. Parole Comm'n*, 962 So. 2d 1040, 1043 (Fla. 1st DCA 2007) (in general, "when a prisoner is released from prison by mistake, his sentence continues to run in the absence of some fault on his part").

effects, too, 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). Indeed, because of the First District's refusal to withhold issuance of the mandate, 30 inmates may seek immediate release.

This Court should have the last word on such a momentous issue—particularly because the First District's decision was incorrect. The First District misperceived the original meaning of the phrase "a violation of" in Section 944.275(4)(e). When the Legislature enacted that phrase, it did so against the backdrop of a consistent judicial and executive-branch practice of construing that phrase to include a violation of not only the attempt statute, but also the underlying substantive offense. *See*, *e.g.*, *Scott v. Williams*, 107 So. 3d 379, 387-88 (Fla. 2013) (interpreting statute in light of "backdrop of precedent" against which it was enacted). Just months before the Legislature added this phrase to the statute in 2014, the Fifth District had explained that the term encompassed attempt offenses—a conclusion bolstered by *Wilcox*. *Fureman*, 161 So. 3d at 407-08.

And prosecutors had 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 here. App'x 28 (Makar, J., dissenting). Court after court had referred to attempted sexual battery as a "violation of" Section 794.011.[4] These considerations inform the plain, original meaning of Section 944.275(4)(e).

There is likewise good reason for this Court to accept review now, rather than waiting for further "ripen[ing]" of the conflict. Certification Opinion, 2022 WL 2092492, at *20. Inmates seeking mandamus relief on the theory espoused below must file in the First District, meaning few if any cases—only those involving petitions for

[4] *Prentice v. State*, 319 So. 3d 57, 62 (Fla. 4th DCA 2021); *McCarron v. State*, 185 So. 3d 666, 667 (Fla. 2d DCA 2016); *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, 1219 (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).

habeas corpus—will be filed elsewhere. *See Bush v. State*, 945 So. 2d 1207, 1212-14 (Fla. 2006). Thus, waiting for the conflict to further ripen is not likely to produce a better vehicle for the Court's review. Certification Opinion, 2022 WL 2092492, at *23 (Makar, J., dissenting) (describing the "urgent need for supreme court review").

CONCLUSION

This Court should grant review.

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 22nd day of September, 2022, on all parties required to be served, including counsel for Respondent:

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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 2,494 words, in compliance with Rule 9.210(a)(2)(A) of the Florida Rules of Appellate Procedure.

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