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

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

So that dangerous sexual offenders serve their entire sentences, the Legislature provided that the Department of Corrections "may not grant incentive gain-time if the offense is a violation of . . . s. 794.011," the statute that criminalizes sexual battery. § 944.275(4)(e), Fla. Stat. Respondent is not excused from that restriction simply because he tried, but failed, to commit a sex offense.

The State's opening brief demonstrated that attempted sexual battery is "a violation of" Section 794.011. That phrase is a term of art that, as of 2014 (when the Legislature enacted it), had acquired a settled meaning encompassing not only the substantive offense, but also an attempt to commit that offense. Init. Br. 9–15.

Respondent makes little attempt to refute that the words "a violation of" is, in context, a term of art informed by years of judicial and prosecutorial usage. He instead relies primarily on inapposite decisions from the district courts, a case from this Court about whether attempted murder is a nonhomicide offense for purposes of *Graham v. Florida*, 560 U.S. 48 (2010), and statutory definitions not

at issue here. Respondent also implausibly insists that in passing a statute that significantly increased punishments for attempted sexual offenses, the 2014 Legislature simultaneously intended to show leniency for attempt offenders above and beyond that already mandated by Florida's sentencing scheme. Finally, Respondent recycles the jurisdictional arguments this Court has already rejected in accepting this case. None of those arguments alter the equation.

The Court should quash the First District's decision.

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.

When it enacted Section 944.275(4)(e), the Legislature employed a legal term of art: the phrase "a violation of." By 2014, courts had for decades described attempt offenses—and attempted sexual battery specifically—as involving "a violation of" the substantive offense statute, including a Fifth District decision right before Section 944.275(4)(e) was enacted. Init. Br. 12–13. And prosecutors have long charged defendants with a "violation" of both the attempt statute and the substantive statute, including in Respondent's case. Init. Br. 14. Legislature thus transplanted the term of art "a violation of," and its

well-understood meaning in this context, from those sources. *See* Init. Br. 10–11, 15.

Respondent does not meaningfully address that analysis. Instead, he begs the question, pointing out that Section 944.275(4)(e) does not expressly mention attempts, and repeating the district court's reasoning that "[c]ommon sense" purportedly indicates that an attempt is not "a violation of" the substantive statute. Ans. Br. 7–8. To the extent that Respondent means to rely on the ordinary meaning of the phrase "a violation of," he ignores the State's textualist showing that the "context" here indicates that "a technical meaning applies," Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73 (2012), rather than an ordinary meaning.

Respondent brushes off the decades of judicial decisions describing an attempt as "a violation of" the substantive statute by arguing that none of them "held that a person convicted of attempted sexual battery actually committed a sexual battery." Ans. Br. 15. But whether an attempt offender "actually committed a sexual battery" is irrelevant—the question is whether the offense was also "a violation

of" the sexual battery statute. Those decisions all answer that question in the affirmative.

As for the longstanding prosecutorial charging practices, Respondent maintains that "an attempt does not punish an actual violation of the subject offense, only that of § 777.04(1)." Ans. Br. 19. That is simply wrong—any punishment for a violation of Section 777.04 can be calculated only with reference to the underlying offense attempted, as the attempt statute is not even listed in the offense-severity ranking chart. *See* § 777.04(4), Fla. Stat.; § 921.0022, Fla. Stat. In any event, both the prosecutorial practice and the judicial usage of the term "a violation of" shows what the Legislature meant in 2014 when it adopted that very term in Section 944.275(4)(e).[1]

Respondent also errs in relying (Ans. Br. 15, 20–21) on *Gridine v. State*, 175 So. 3d 672 (Fla. 2015). At most, *Gridine* holds that a

[1] Respondent briefly discusses *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023), but the Sentencing Guidelines language at issue there was different; it did not use the term "a violation of" or another legal term of art that could have included attempt offenses in the Guidelines' meaning. Ans. Br. 21 n.8.

juvenile does not "commit" a homicide offense—for purposes of asking whether the juvenile should receive a meaningful opportunity for release under the rule announced in *Graham*, 560 U.S. at 74—by committing attempted murder. 175 So. 2d at 674. It hardly follows, however, that an attempted sexual battery is not "a violation of" the sexual battery statute for purposes of Section 944.275(4)(e).

That is especially so given that this Court considers attempted murder to be codified in both the attempt statute *and* the substantive statute. *See* Init. Br. 19–20 (discussing *Coicou v. State*, 39 So. 3d 237 (Fla. 2010) & *Weatherspoon v. State*, 214 So. 3d 578 (Fla. 2017)).[2] The general penalties statute (and a First District decision interpreting it, *Hurst v. State*, 257 So. 3d 1202, 1204 (Fla. 1st DCA 2018)), points in the same direction. *See* Init. Br. 22–24.

[2] Respondent tries to distinguish *Coicou* and *Weatherspoon* by noting that neither case held that "a conviction of attempted murder was a conviction under the homicide statute." Ans. Br. 21. But those cases are relevant not because the Court said anything about whether an attempt was "a conviction under" the homicide statute; they are relevant because in both the Court described an attempted murder offense as being codified in *both* the attempt statute *and* the substantive statute.

Respondent cites (Ans. Br. 8–10) three decisions from the district courts of appeal interpreting different statutory language that made inmates ineligible for *basic* gain-time if they were "convicted of committing a sexual battery." § 794.011(7), Fla. Stat. (1993). *Zopf v. Singletary*, 686 So. 2d 680, 681 (Fla. 1st DCA 1996); *McArthur v. State*, 730 So. 2d 333, 334 (Fla. 5th DCA 1999); *Clark v. State*, 855 So. 2d 691, 693 (Fla. 2d DCA 2003). That an attempt offender was not "convicted of committing" the substantive crime, however, is a much different question than whether an attempt offender committed an offense in "violation of" the substantive statute for purposes of Section 944.275(4)(e). If anything, the contrast between that language and the language of Section 944.275(4)(e)—which refers not to what specific offense of which an offender was "convicted" but instead to what statutes his conduct implicates—only underscores that the Legislature meant something quite different here.

Finally, citing examples, Respondent argues that the Legislature "knows how to include attempts in any given statute if it deems that inclusion appropriate." Ans. Br. 16. Yet like the examples cited by the First District for the same proposition (R.236–37), none

provide that such attempts are "a violation of" the substantive statute. They are thus better understood as representing the Legislature's judgment that attempt offenders should—despite the general rule—be treated the same as those who complete the substantive offense in those specific contexts. *See* Init. Br. 17 n.6. In other words, although the Legislature expressly included attempt offenders in providing for enhanced punishments for career criminals, sexual predators, sexual offenders, and those who use weapons while committing felonies (Ans. Br. 16–17), that does not cast doubt on the ability of the Legislature to use a term of art to include attempt offenders if it so chooses (as it did here).[3]

[3] When Respondent filed his brief, legislation to codify the Department's interpretation going forward was pending; it has now passed and, if signed into law, will apply to offenses committed on or after July 1, 2023. *See* CS/HB 537, 2023 Leg., Reg. Sess. (Fla. 2023). That legislation says nothing about Section 944.275(4)(e)'s original meaning. And despite Respondent's contrary argument (Ans. Br. 17 n.5), it demonstrates only that this Legislature agrees with the *Department's* interpretation and merely seeks to codify it in case the Court disagrees. *Cf. Leftwich v. Fla. Dep't of Corrs.*, 148 So. 3d 79, 83 (Fla. 2014) (explaining that "a statutory amendment may be relevant to a determination of the intent behind the previous statute").

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

Respondent's interpretation of Section 944.275(4)(e) is also wrong because an attempt offense is not a "stand alone crime" (Ans. Br. 18)—it is "a violation of" both the attempt statute and the substantive statute. *See* Init. Br. 15–24. In arguing otherwise (Ans. Br. 18–20), Respondent echoes the First District's mistake of focusing on the attempt statute (Section 777.04) instead of what the text of Section 944.275(4)(e) meant when adopted. *See* Init. Br. 16–17. In any event, one cannot even conceive of "a violation of" the attempt statute without a corresponding substantive statute; "[t]here is no such crime as bald attempt." *United States v. Resendiz-Ponce*, 549 U.S. 102, 115 (2007) (Scalia, J., dissenting). *That* is why Section 944.275(4)(e) "nowhere mentions § 777.04(1)" (Ans. Br. 14): It would make no sense.

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

In 2014, the Legislature significantly increased punishments for sexual offenders and added Section 944.275(4)(e)'s prohibition on

incentive gain-time for enumerated offenders. By so doing, the Legislature augmented punishment for attempted sexual offenders as well, because sentences for attempt offenses are tied to sentences for completed offenses. *See* § 777.04(4)(a), Fla. Stat. Yet in Respondent's view, the Legislature simultaneously afforded attempted sex offenders leniency by maintaining their eligibility for incentive gain-time. Ans. Br. 23–26. As the Department has explained, the Legislature did the opposite. *See* Init. Br. 24–29.

Respondent has no answer for the odd consequences that would result if his interpretation were to prevail. For example, it would bar incentive gain-time for comparatively minor sex offenses but allow incentive gain-time for those who attempted far more dangerous sex offenses. *See* Init. Br. 27. And though he insists (Ans. Br. 26) that this case "has nothing whatsoever to do with sexual offender probation," his interpretation could also affect the proper interpretation of Section 948.30, regarding the application of standard sex offender probation conditions. *See id.* After all, Section 948.30 uses the same "a violation of" phrase without specifically listing attempt offenses. *See* Init. Br. 27–28.

IV. THE COURT HAS JURISDICTION.

Finally, Respondent rehashes the jurisdictional arguments he presented in his jurisdictional brief. But for the reasons set out in the Department's jurisdictional brief, the Court correctly concluded that it has jurisdiction.[4] Pet. Jur. Br. 4–10.

Respondent first argues that decisions from the First District, the Second District, and the Fifth District agree that attempt offenders are "eligible to be considered" for gain time. Ans. Br. 27–29. Yet none of those decisions involved *incentive* gain-time or the meaning of Section 944.275(4)(e)—nor could they, as each case was decided over a decade before Section 944.275(4)(e) was enacted. *Zopf*, 686 So. 2d at 681; *McArthur*, 730 So. 2d at 334; *Clark*, 855 So. 2d at 693. And for the reasons discussed above, those cases also involved different statutory language. *See supra* at 6.

[4] Respondent points out that the Department argued in its jurisdictional brief that "this case is exceptionally important and . . . the decision below is wrong." Ans. Br. 31 (quoting Pet. Jur. Br. 10). But the Department did not argue that the case's importance or the erroneousness of the decision below were bases for jurisdiction; it argued that they were reasons why the Court should exercise its discretion and accept jurisdiction. Pet. Jur. Br. 10.

Respondent also repeats his and the First District's argument that none of the Fifth District conflict cases interpreted Section 944.275(4)(e), but the Department has already explained why those cases nevertheless conflict with the decisions below because they construed the identical statutory text differently. Pet. Jur. Br. 8–10. The Fifth District has held that attempted sexual battery violates the substantive sexual-battery statute, and the First District—reversing its own precedent on which the Fifth District had relied—held the opposite below. *Id.* at 8. The Court's jurisdiction is secure.

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 10th day of May, 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 2,081 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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