IN THE SUPREME COURT OF FLORIDA

GARRETT STATLER,

Petitioner,

vs. CASE NO. SC21-119

STATE OF FLORIDA,

First DCA No. 1D19-264

Respondent.

_____/

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

REPLY BRIEF OF PETITIONER
ON THE MERITS

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To avoid finding the provision unconstitutional for lack of *mens rea*, section 794.011(5)(b), Florida Statues, should be construed to require knowledge by the accused of the alleged victim's nonconsent.

A. Statutory Construction

Respondent asserts that the plain meaning, history, and "overarching purpose" of section 794.011 demonstrate that the Legislature intended to make knowledge of nonconsent irrelevant to a prosecution for sexual battery involving adults. The state then maintains that this construction comports with due process of law. Both contentions are incorrect.

This Court has recognized that plain meaning is not the Rosetta Stone for discerning *mens rea* in criminal felony statutes. Neither of the statutes at issue in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004), and *Chicone v. State*, 684 So. 2d 736 (Fla. 1996), contained an explicit knowledge component. Yet this Court construed both to contain *mens rea*: knowledge of the illicit nature of the substance in *Chicone* and knowledge of the sexual offender registration requirements in *Giorgetti*. This Court "will ordinarily

presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent." *Giorgetti*, 868 So. 2d at 516.

In enacting section 794.005, Florida Statutes, the Legislature signaled its intent to require knowledge of nonconsent to the "force and violence that is inherent in the accomplishment of 'penetration' or 'union'" for the "basic charge of sexual battery" now contained in section 794.011(5)(b). But even if chapter 794, Florida Statutes, were silent on *mens rea* for the offense, *Giorgetti* and *Chicone*, as well as the U.S. Supreme Court precedent on which they rest, would require that the provision be construed to include *mens rea*.

Respondent attempts to demonstrate that provisions governing aggravated forms of sexual battery forgo *mens rea*, which in the state's view would create an anomaly if the core offense in this case included an element of knowledge of nonconsent. (Ans. brf. at 18-20) The state's premise is flawed. Under the polestar principle governing legislative intent on *mens rea* in criminal felony statutes, a requirement of guilty knowledge should be presumed unless the Legislature affirmatively indicates otherwise. An accused's knowledge that an alleged victim has a mental defect or has been

drugged, either of them which makes sexual battery a first-degree felony, subsumes and supplants the knowledge of nonconsent that would otherwise be required to convict of the second-degree felony in section 794.011(5)(b). Of the four remaining aggravated sexual battery offenses charted by respondent (Ans. brf. at 19 n.2), two contain an element of coercion. The remaining two, physical helplessness and physical incapacitation, at least implicitly require *mens rea* equal to that required by subsection (5)(b).

Abdallah v. State, 2021 WL 6057100 (Fla. 3d DCA Dec. 22, 2021), cited by the state to demonstrate there is no *mens rea* for sexual battery on a person physically helpless to resist, (Ans brf. at 19 n.2), is unreliable precedent at best. First, *Abdallah* is a narrow decision that should be limited to its facts:

> [T]he evidence showed that K.N. was *not* communicative, and did not have the capacity to consent. On this record, we are unable to conclude that the trial court abused its discretion by denying the special jury instruction.

Id. at *6. Second, *Abdallah* is pending rehearing following a court-ordered response from the state. Third, the issue in *Abdallah* was knowledge the alleged victim was physically helpless to resist, not

knowledge of consent by an alleged victim with no physical impairment. Finally, the briefs in *Abdallah* (No. 3D19-1581) do not reflect a due process challenge.

Respondent's reliance on section 825.1025, Florida Statutes (Ans. brf. at 21), illustrates only that when the provision was enacted, the Legislature was concerned about leaving *mens rea* out of new criminal felony laws. Section 825.1025 first became law in 1996, the same year this Court decided *Chicone* and eight years before its decision in *Giorgetti.* Ch. 96-322, § 1, Laws of Florida. Uncertain whether courts would either read *mens rea* into a statute on which it was silent or declare the provision unconstitutional, the Legislature could reasonably have opted to proactively include the requirement of guilty knowledge. This saved lawmakers the trouble of abrogating any judicial gloss with which it disagreed, such as when it superseded *Chicone* in enacting section 893.101, Florida Statutes. There the Legislature shifted knowledge of the illicit nature of the substance from element to affirmative defense, which helped inoculate drug possession provisions against a due process challenge. In contrast, when the trial court denied Statler's motion for judgment of acquittal in this case, it ruled that the issue of

knowledge of nonconsent was not cognizable as an element or an affirmative defense.[1]

Similarly, the state's chart showing that 10 states have made knowledge of nonconsent explicit in their laws on sex crimes (Ans. brf. at 23-24) proves nothing about the omission of *mens rea* from a criminal felony law. *Giorgetti* recognizes the default presumption in such instances: presume intent to include *mens rea* unless the Legislature indicates intent to forgo it.

As did the First DCA in this case, respondent relies on *Watson v. State*, 504 So. 2d 1267 (Fla. 1st DCA 1986). First, as noted in the initial brief, Watson concerned a conviction of sexual battery with great force, which carries an inherent *mens rea* involving the use of force. Second, the *Watson* panel cited no authority for its statement that "whether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of crime." *Id.* at 1269. Much has changed since 1986. This Court decided *Chicone* and *Giorgetti*, the Legislature amended section 794.011 eleven times, and, in 1992, it enacted section 794.005.

[1] "Whether he believes he has consent is not a defense." (T-770-71)

Although the state invokes "nearly four decades" of precedent for its position (Ans. brf. at 24), its support collapses into, at most, several thinly supported state court decisions. The U.S. Court of Appeals for the Eleventh Circuit deferred to state court interpretations of state law when it affirmed the denial of Watson's habeas petition. *Watson v. Dugger*, 945 F.2d 367, 370 (11th Cir. 1991). The Eleventh Circuit also concluded that the facts in *Watson* did not justify an instruction on knowledge of lack of consent:

> [T]he evidence … strongly suggests that defendant could not reasonably have believed he had the victim's consent. The victim suffered relatively severe injuries to her face, had marks around her neck which indicated strangulation, and testified that the defendant told her to "be quiet if she ever wanted to see her family again." The individuals who overheard much of what transpired testified that they heard the woman tell the man that she could not breathe and that he was hurting her. Moreover, they heard repeated slapping noises during the incident. Under these circumstances, there is little basis to contend that the petitioner held an objectively reasonable belief that the victim consented.

Id. at 371. Here, in contrast, there was no violence whatsoever or protests by A.B. during the sexual encounter with Statler. She told

him "harder" several times, said it felt good, made other pleasurable sounds, and reached orgasm. (T.291-95, 305)

Respondent also relies on the statement in *Jackson v. State*, 640 So. 2d 1173 (Fla. 2d DCA 1994), that neither state of mind nor intent is an issue in a sexual battery prosecution. (Ans. brf. at 25) *Jackson* quotes *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982), for this proposition. *Coler* involved the rape of a child, the defendant's own daughter, and preceded the statement of intent on the basic charge of sexual battery in section 794.005 by a decade. The First DCA's observation that the case law "has not been questioned for decades" (Ans. brf. at 25) carries little weight in light of its failure to address the amendments to section 794.011, the enactment of section 794.005, and the relative rarity of the scenario reflected by the evidence in this case.

Respondent's reliance on *Reyna v. State*, 302 So. 3d 1025 (Fla. 4th DCA 2020) (Ans. brf. at 26), is misplaced. The holding in *Reyna* that collateral-crimes evidence was erroneously admitted rests largely on the dissimilarity of the charged and collateral crimes. *Id.* at 1032-33. The excerpt quoted by the state also rests in part on *Coler*, a capital sexual battery case decided before enactment of

section 794.005. The panel's observations on *mens rea* were made only in response to the dissent's contention that the collateral-crime evidence was relevant to show absence of mistake. *Id.* at 1033-34.

Doe v. Celebrity Cruises, 394 F.3d 891 (11th Cir. 2004), cited by the state (Ans. Brf. at 26), is a tort case reflecting only federal courts' deference to state courts' interpretations of state law. But *Doe* also notes that Florida law equates sexual battery with an intentional tort and quotes a Florida case stating that tort liability is concerned with "an intent to bring about a result which will invade the interests of another in a way that the law forbids." *Id.* at 917. *Abdallah*, again invoked by respondent, is addressed above.

Because the precedent on which it relies largely precedes enactment of section 794.005 and is not on point with the issue here, the state's claim that "Florida's approach" (Ans. brf. at 27) omits knowledge of nonconsent from section 794.011(5)(b) is incorrect. "Florida's approach" is stated in *Giorgetti*: this Court "will ordinarily presume that the Legislature intends statutes defining a criminal violation to contain a knowledge requirement absent an express indication of a contrary intent." *Giorgetti*, 868 So. 2d at 516. Respondent has not identified a justification for departure

from this presumption. Its historical dive (Ans. brf. at 29-33) into Florida's statutory rape laws—those involving sexual relations with underaged persons—provides little insight into legislative intent as to the 2016 version of section 794.011(5)(b) under which Statler was convicted.

The state next employs social science statistics on underreporting of sexual battery and post-traumatic stress disorder, as well as other provisions in Florida law that do not bear on *mens rea*, to conclude it is "exceedingly unlikely" the Legislature meant to require knowledge of nonconsent to convict a defendant under section 794.011(5)(b). To the extent this Court wishes to indulge these considerations, it should also note that false rape accusations are prevalent, not least in the university setting in which this case arose. A 2010 study classified as demonstrably false 8 out of 136 (5.9%) reported rapes at a major Northeastern university over a ten-year period. Lisak, David, *et al.*, "False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases." *Violence Against Women* 16 (12): 1318–1334 (2010). Other studies on false accusations are summarized at

https://en.wikipedia.org/wiki/False_accusation_of_rape#cite_note-VAW-1.

Statler, who had no prior criminal record, now stands convicted of a second-degree felony for which he spent 18 months in prison, is now serving 10 years of sex offender probation, and has been designated a sexual offender with lifetime reporting requirements and an Internet page identifying him as such. Given the steep consequences of a sexual battery conviction, the Legislature may have opted to require knowledge of nonconsent—or to allow the presumption in favor that requirement to operate—as a hedge against wrongful conviction under section 794.011(5)(b).

The state resorts to "textual, contextual, historical, and other indications" (Ans. brf. at 42) as a prelude to its discussion of *Giorgetti*, which creates an insurmountable hurdle for its position. Respondent lifts a quote from *Giorgetti* stating that the indication of intent to remove *mens rea* may be "implied," but in that passage this Court was quoting from the U.S . Supreme Court decision in *Staples v. United States*, 511 U.S. 600 (1994). This Court then acknowledged that in *Staples* and other decisions, the U.S. Supreme Court "has virtually created a presumption in favor of a

guilty knowledge element absent an *express* provision to the contrary." 868 So. 2d at 516 (emphasis supplied). The Court went on to conclude that because the statute at issue in *Giorgetti* "contains no expression of any intent to remove knowledge as an element" of the offenses, the district court was correct "to construe a knowledge requirement into the statutes." *Id.* at 519 (emphasis supplied).

Respondent again invokes subsections 794.011(4)(e)4 and (4)(e)5 as demonstrations "of the Legislature's decision to require awareness related to consent." (Ans. brf. at 42) These provisions involve administration of a drug without consent and knowledge of a victim's mental defect as factors that elevate the offense from a second-degree felony to a first-degree felony. As noted above, the *mens rea* for both crimes supersedes and subsumes knowledge of nonconsent. Neither provision speaks directly to a defendant's knowledge of nonconsent to union or penetration of a person who has not been administered a drug and is not mentally defective. However, respondent's observation that "[i]t makes no sense that this *lower* degree of offense requires a *higher* mental state than its statutory companions" (Ans. Brf. at 50) applies to the discussion on

attempt, solicitation, and conspiracy under section 777.04, Florida Statutes. (Ans. Brf. at 47). A completed sexual battery is punished more severely than those inchoate offenses and, following the state's logic, should therefore not carry a less culpable *mens rea*.

The state's invocation of *Morissette v. United States*, 342 U.S. 246 (1952), for the proposition that sex offenses are a recognized exception to the presumption in favor of a knowledge element (Ans. brf. at 43) is misleading. There the Court limited the exception to lack of knowledge of the victim's age, which "was determinative despite defendant's reasonable belief that the girl had reached age of consent." *Id.* at 251 n.8. Presumably, the rule, rather than the exception, applied to a reasonable belief that an alleged adult victim had consented. The same distinction invalidates the state's reliance on "[t]he Legislature's approach to the mistake-of-age defense." (Ans. brf. at 45 n.14)

In its brief discussion of section 794.005, Florida Statutes (Ans. brf. at 50), the state says nothing about the provision's requirement that sexual battery involving two adults requires "the force and violence that is inherent in the accomplishment of 'union' or 'penetration.'" Once more, the state returns to subsections

794.011(4)(e)4 and (4)(e)5 with no acknowledgment that these provisions create an aggravated form of sexual battery that raises the potential punishment from 15 to 30 years in prison—or life for a repeat offender. § 794.011(4)(d), Fla. Stat. As aggravated offenses, these offenses justifiably require higher *mens rea*—administration of an incapacitating substance without consent or knowledge of a victim's mental defect—than the mere knowledge of nonconsent that should be read into subsection 794.011(5)(b).

Respondent's advocacy for a *mens rea* of criminal negligence has no more support in precedent or the statutory language than its effort to banish *mens rea* entirely from subsection 794.011(5)(b). (Ans. brf. at 52) And its proposal of a negligence standard, although not inconsistent with defense counsel's argument below, was flatly rejected by the trial court in considering and ultimately denying (T.842) the motion for judgment of acquittal:

> THE COURT: The issue is not whether he believes he has consent; correct? The issue is whether she gave consent.
>
> MS. SHESLOW: Well, I don't think you can be guilty of battery if you don't have any kind of criminal intent at all.
>
> THE COURT: Well, that's not the law in this case; is it? … Whether he believes he has consent is not a defense…

> MR. SHESLOW: Well I think intent can still be raised at JOA.
>
> …
>
> THE COURT: Well, I just want to make clear your argument there, that he – your hypothesis that he believed he had consent. That is not for the court to consider.

(T.770-71)

B. Remedy

The state's argument that the trial court correctly denied the motion for judgment of acquittal (Ans. brf. at 53-54) omits that the court concluded it could not consider evidence of Statler's mental state in ruling on the motion. Evidence in the state's case-in-chief demonstrating that the evidence was insufficient to show Statler did not reasonably believe he had consent includes:

- A.B. had been taking medication for generalized anxiety disorder, including one medication that made her want to kill herself. (T.365-67)
- She'd had 3-1/2 drinks before her sexual encounter with Tait and was too tipsy to drive a car. (T.203, 317)
- Upon emerging from the bedroom after sex with A.B. and telling Statler "It was great, two times, you can try" and "go try it." (T.750-52)
- A.B. acknowledged that she told Statler to "go harder" while they were having sex and that it felt good. (T.239)
- When, afterward, A.B. accused Statler of raping her, he replied, "No. We're just partying." (T.246)

The trial court did not rule on the motion for judgment of acquittal until the defense had presented witnesses Philip Bedran and Cody Statler. (T.842) *See* Fla. R.Crim. P. 3.380(a) ("If at the close of … all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of … the defendant shall, enter a judgment of acquittal."). They testified:

- A.B. flirted with all four guys she met while with Tait, including the defendant, in a touchy-feely manner indicating it would be OK if one of them wanted to do something with her. (T.793, 813, 827)
- A.B. asked the defendant and others if they would come up to the apartment with her and Tait and if he wanted to party and hang out, "like she was checking us all out from the git-go" while conveying a sexual vibe. (T.807)
- After emerging from the bedroom following sex with A.B., Tait told Statler that A.B. wanted him to go in there in a manner indicating A.B. was delivering consent through Tait. (T.833, 884)
- Only after Statler returned to the bedroom after the sexual encounter with A.B. and relayed Tait's message to A.B. that she should leave did A.B. become upset. (T.818, 835)

Even in the light most favorable to the state, the evidence justified granting a judgment of acquittal for failure to present competent, substantial evidence that Statler knew or reasonably should have

known that A.B. did not consent. In the alternative, as argued in the initial brief, fundamental error resulted from failing to instruct the jury that to find Statler guilty, it had to find beyond a reasonable doubt that he knew or reasonably should have known that his sexual encounter with A.B. was without her consent.

C. Due Process

The U.S. Supreme Court precedent on which respondent relies to support constitutionality (Ans. brf. at 57-58) does not support its assertion that a construction of section 794.011(5)(b) which omits the *mens rea* of knowledge of nonconsent comports with due process. *Giorgetti* relies on *Staples*, in which the U.S. Supreme Court distinguished its decisions regarding public welfare offenses lacking *mens rea* from a criminal felony statute involving possession of a fully automatic weapon:

> Our characterization of the public welfare offense in *Morissette* hardly seems apt … for a crime that is a felony, as is violation of § 5861(d).16 After all, "felony" is, as we noted in distinguishing certain common-law crimes from public welfare offenses, " 'as bad a word as you can give to man or thing.' " Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of

> the public welfare offense. In this view, absent a clear statement from Congress that *mens rea* is not required, we should not apply the public welfare offense rationale to interpret any statute defining a felony offense as dispensing with *mens rea*.

511 U.S. at 618 (internal citations omitted). Sexual battery involving adults is derived from the common-law. Like the firearm offense at issue in *Staples*, section 794.011(5)(b) punishes what would otherwise be entirely lawful, innocent conduct when it involves consenting adults.

The state has pointed to *United States v. Balint*, 258 U.S. 250 (1922) as a case affirming a federal conviction under a law that did not exempt drug sellers who did not know the illicit nature of the items sold. Of course, this Court in *Chicone* ruled to the contrary on this very issue, and the U.S. Supreme Court questioned the continuing validity of *Balint* in *Staples*.[2] In the same vein, the state's invocation of *Williams v. North Carolina*, 325 U.S. 226 (1945) (Ans.

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[2] It is not clear that Florida courts recognize any public welfare exception to the *mens rea* requirement. In *Ramirez v. State*, 113 So. 3d 28 (Fla. 2d DCA 2012), the district court read *mens rea* into a statute criminalizing employment of a convicted felon by a bail bond agency, a measure it characterized as designed to protect the public welfare. *Id.* at 30.

brf. at 57) omits that *Williams* involved a public welfare statute, one which prohibited bigamy, a measure "bearing upon the integrity of public life." *Id.* at 238.

But for a construction requiring the government to prove that the accused did not reasonably believe the act was consensual, section 794.011(5)(b) denies defendants due process of law under the Fourteenth Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

In asserting that Statler "tricked A.B. into having sex with him without her consent," (Ans. brf. at 59) the state claims a conclusion that can be reached only by a jury correctly informed on the law, including the constitutional requirement of *mens rea* to convict an accused of a serious felony. Its repeated attempt to equate the lack of a culpable mental state for sexual battery involving adults to ignorance of age in statutory rape prosecutions founders on the consideration that, as a public health measure, children cannot lawfully consent to sex. In *Feliciano v. State*, 937 So. 2d 818, 819 (Fla. 1st DCA 2006), the district court upheld section 794.05, Florida Statutes, against a challenge that it did not require knowledge that the alleged victim was 16 or 17 years of age. The

court distinguished *Staples*, parenthetically quoting its language declining to apply a "public welfare offense rationale" to a felony statute dispensing with *mens rea*.

The state discusses *Lambert v. California*, 355 U.S. 225 (1957), as a case understood to require a *mens rea* only for statutes punishing failure to perform an affirmative duty to act. (Ans. brf. at 57-58) However, in *Giorgetti*, this Court did not limit its concerns regarding due process to measures that penalize failure to perform an affirmative duty to act. To petitioner's knowledge, no Florida court has understood *Giorgetti* to be limited in this manner. In any event, section 794.011(5)(b) may be viewed as a measure imposing upon persons the duty to ensure consent before engaging in sexual activity. This necessitates incorporating *mens rea* into the law even under the state's *Lambert* limitation.

CONCLUSION

In fulfilling its responsibility to seek justice, not merely conviction, the state errs in asserting that Statler asks this Court to hold that either the text of section 794.011(5)(b) or the Due Process Clause "excuses" his actions. (Ans. brf. at 61) Nothing in the precedent on *mens rea* involves the affirmative defense of excuse. The relief Statler seeks—either acquittal or a new trial before a correctly instructed jury—is the consequence of the state's failure to prove the crime and the trial court's failure to ensure that guilt or innocence was decided by a correctly instructed jury. This Court should not be deterred by the state's characterization.

CERTIFICATES AND SIGNATURE OF COUNSEL

I hereby certify, pursuant to Florida Rule of Appellate Procedure 9.045, that this brief complies with the applicable font and word-count-limit requirements. I hereby certify that this brief was served, via the Florida Courts E-Filing Portal, on Chief Deputy Solicitor General Jeffrey Paul DeSousa, at jeffrey.desousa@myfloridalegal.com, on March 21, 2022.

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