SC21-119

In the Supreme Court of Florida

GARRETT STATLER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Discretionary Review from
the First District Court of Appeal
DCA No. 1D19-264

ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

I. Whether Section 794.011(5)(b)—which makes it a second-degree felony to engage in various types of sexual conduct with another person "without that person's consent"—requires proof that the defendant subjectively knew the victim did not consent.

II. Whether Section 794.011(5)(b) violates the Due Process Clause because it does not require knowledge of nonconsent.

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INTRODUCTION AND SUMMARY OF ARGUMENT

Rape is a uniquely egregious crime. Indeed, "[i]t is hard to imagine what could cause emotional distress more severe than the psychological trauma of rape." *Hill v. Cundiff*, 797 F.3d 948, 984 (11th Cir. 2015). For that reason, the State of Florida has long labored to deter and punish rape, recognizing it as a strict-liability offense for over a century and passing a range of laws designed to ensure that perpetrators do not evade justice.

Petitioner Garrett Statler snuck into the bedroom where A.B. was resting, impersonated the man with whom A.B. had moments earlier engaged in sexual intercourse, and penetrated A.B. from behind without announcing himself or requesting her consent. By any reasonable standard, that constituted rape.

So it is in Florida. The State's base-level offense of sexual battery, Section 794.011(5)(b), makes it a second-degree felony for any person 18 years or older to engage in certain sexual activity with another adult "without that person's consent." Petitioner claims, however, that to obtain a conviction the State must prove that he subjectively *knew* that the victim did not consent. Putting aside that

this argument is no help to him—ample evidence proved that Petitioner *did* know that A.B. had not consented—Petitioner is mistaken: Section 794.011(5)(b) does not require independent proof of the defendant's subjective awareness of nonconsent. It instead requires only nonconsent, meaning a jury finding that the victim gave no outward indications of a willingness to engage in sexual intercourse that would have led an objectively reasonable person to believe she had consented.

I.A. Five considerations make that clear. *First*, the plain text of the statute does not require knowledge; it simply requires that the victim have not consented. The surrounding statutory context confirms that reading, as Section 794.011(5)(b) stands in contrast with other provisions of Section 794.011 that expressly require knowledge, and with the approach other state legislatures have taken when intending to require proof of knowledge.

Second, courts interpreting Section 794.011 have uniformly held that "[s]tate of mind is not a material fact in a sexual battery charge," *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982); *see Watson v. State*, 504 So. 2d 1267, 1269 (Fla. 1st DCA 1986), and that

interpretation has remained consistent for decades.

Third, acknowledging that knowledge of nonconsent is not an element tracks Florida's lengthy tradition of rejecting the defense that a rape defendant did not know the attendant circumstances of the sexual attack, including the fact that the victim had not attained the age of consent.

Fourth, this approach best effectuates the law's purpose of safeguarding the bodily and sexual autonomy of Florida residents. And the Legislature has repeatedly underscored that objective, enacting a string of amendments designed to make sexual-battery prosecutions easier to bring.

Fifth, the lack of a knowledge requirement does not risk criminalizing innocent behavior. The statute does not criminalize sex with a consenting person. And consent is an objective concept that exists when a person's words or actions manifest to a reasonable observer the willingness to engage in sexual conduct. A defendant is therefore never liable under Section 794.011(5)(b) when the alleged victim's outward expressions reasonably conveyed consent—expressions whose presence or absence can be readily perceived by

the defendant. In other words, protections like those of a *mens rea* requirement are built into the objective nature of consent and prevent the criminalization of innocent conduct. In this way, Section 794.011(5)(b) is not a true strict-liability offense. Petitioner could have requested a jury instruction explaining the objective nature of consent, but did not.

B. Petitioner's interpretive arguments do not change the outcome. He argues, primarily, that the presumption of *mens rea* requires the Court to read into Section 794.011(5)(b) a subjective-knowledge requirement. But that presumption can be overcome by express or implied indications elsewhere in the statute that the Legislature rejected a *mens rea* requirement, and for the reasons detailed above, it did so here. In any event, the presumption should apply only rarely: when the Legislature codifies a common-law crime requiring knowledge or where requiring knowledge is needed to save the constitutionality of the statute. And Petitioner's other arguments at most would show that Section 794.011(5)(b) requires criminal negligence or recklessness, not knowledge.

C. Even if Petitioner were right that the statute requires a guilty

mental state, his conviction still should be affirmed. Petitioner is not entitled to judgment of acquittal because the evidence was more than sufficient for a reasonable jury to conclude that Petitioner knew that A.B. did not consent. He failed to obtain A.B.'s consent when he entered her room unannounced, and in the light most favorable to sustaining the verdict, Petitioner's roommate at most told him that he was welcome to see if A.B. *would* consent to sex with Petitioner, not that A.B. had *already* consented. And nothing the roommate said would have justified Petitioner's conduct in any event, as a third party has no power to consent to sex on behalf of another. For the same reasons, Petitioner's plea for a new trial fails, as any error in the jury instructions was not harmful, let alone fundamental.

II. Nor is Section 794.011(5)(b) unconstitutional. The Legislature enjoys broad discretion to criminalize conduct that harms society. It is only where the Legislature penalizes otherwise passive, innocent conduct that it must incorporate a *mens rea* requirement. Sexual battery on a nonconsenting victim is neither passive nor innocent. And it is not unfair to place on an actor the minimal burden of ascertaining objective consent before engaging in sexual activity:

when a person fails to obtain a partner's consent, he creates an intolerable risk of harm.

STATEMENT OF THE CASE AND FACTS

Facts of the Crime. Petitioner was charged and convicted of sexual battery under Section 794.011(5)(b). The chain of events that led to the sexual battery began not with Petitioner but with his roommate, Jonathan Tait. While drinking at a bar at the University of Florida, Tait met A.B., who had likewise been drinking. Tr. 211–13, 685–87. Both were students at the university. Tr. 205, 680. After some conversation, the two agreed to return to Tait's apartment to have sex. Tr. 216–18, 685–90.

On their way, Tait and A.B. briefly encountered Petitioner, his brother, and a third man. Tr. 227–28, 695–96. In her trial testimony, A.B. denied flirting with the men; she was simply polite. Tr. 229–30. Tait confirmed that account. Tr. 696. But Petitioner's brother and the third man, Philip Bedran, testified that A.B. seemed drunk and was flirtatious with all of them. Tr. 792–94, 811–14.

A.B. and Tait soon left the others and arrived at the apartment, where they twice had consensual sex. Tr. 232–34, 699. Tait then told

her to "[w]ait right there" and left the room. Tr. 236; *see also* Tr. 702. A.B. therefore waited on the bed—lying on her stomach facing the wall—for Tait to return. Tr. 235–36, 703. Moments later, she heard someone reenter and felt hands on her hips. Tr. 237. The man scooted her backwards and began penetrating her from behind. *Id.* A.B. assumed the man was Tait and did not turn around. Tr. 237–38, 302.

When they were done, A.B. turned around and saw someone "that was not the same person I was initially having sex with." Tr. 243. Instead it was Petitioner, "grinning like he knew he did something bad," *id.*, and "waiting to see my reaction." Tr. 244.

Stunned, A.B. took a moment to gather herself. *Id.* After putting on her pants, she decided that "I was going to attack this person because what they did to me was attack me." Tr. 245. She then looked up at Petitioner and said, "You raped me." *Id.* Petitioner told her, "No. We're just partying," to which A.B. responded, "No, you fucking raped me," and leaped at Petitioner, trying to claw him with her hands and "screaming at the top of my lungs." Tr. 246–47.

Their struggle spilled into the living room, where Tait tried

separating Petitioner and A.B., and stole A.B.'s phone to prevent her from calling 9-1-1. Tr. 247–52. Tait then forcibly threw A.B. out of the apartment. Tr. 252. A neighbor in the apartment below heard the commotion and came out to find A.B. on the ground, "terrified" and "crying." Tr. 386. A.B. had a "doe-in-headlights look" and kept repeating the phrase "It wasn't him." Tr. 386–87.

The jury also heard what transpired in the brief time between when Tait left A.B. in the bedroom and when Petitioner committed the attack. According to Tait, when he left A.B. in the room he bragged to Petitioner and Bedran, who had by then entered the apartment, about how good the sex was. Tr. 704. Despite A.B. having said nothing to suggest that she would be interested in having sex with Petitioner, Tait commented to Petitioner that "You could try if you want," meaning that Petitioner could "try to have sex with her if you'd like." Tr. 705–06. Bedran recalled the exchange somewhat differently, testifying that Tait told Petitioner that he could go into the room, which Bedran took to imply that A.B. wanted Petitioner to meet her in there. Tr. 833.

Without saying a word, Petitioner "just walked in there."

Tr. 705. Through a crack in the door, Tait could see Petitioner having sex with A.B. in the same position he'd left her in. Tr. 705, 709.

Motion for Judgment of Acquittal. Petitioner moved for judgment of acquittal upon the close of the State's case. Tr. 769–74. He argued that "in terms of intent," the State had not refuted that he "believed that he had consent from the alleged victim." Tr. 770. In fact, Petitioner argued, "all of the evidence that he could have had at the time suggested that it was a consensual act." *Id.*

In response, the trial court observed that the "issue is not whether he believes he has consent"; the issue is instead "whether she gave consent." *Id.*; *see also* Tr. 771 ("Whether he believes he has consent is not a defense."). It therefore denied judgment of acquittal. Tr. 841–42.

Charge Conference, Jury Instructions, and Closing Argument. The trial court and the parties then discussed the proposed jury instructions. Tr. 776–81. During that charge conference, Petitioner did not ask the court to instruct the jury that to convict it had to find that he knew A.B. did not consent to having sexual intercourse. *See id.* Nor did he ask the court to instruct the jury that consent is

evaluated on an objective basis, such that consent is given when a person's objective manifestations reasonably would have conveyed consent to sexual intercourse, rather than evaluated on a subjective basis as determined by a person's internal intentions. *See id.*

Consistent with the standard jury instructions, *see* Fla. Std. Jury Instr. (Crim.) 11.4, the trial court instructed the jury that to find Petitioner guilty of sexual battery under Section 794.011(5)(b) it had to find that:

1. Garrett Statler committed an act upon [A.B.] in which his penis penetrated or made contact with the vagina of [A.B.]

2. Garrett Statler's act was committed without the consent of [A.B.]

3. At the time of the offense, [A.B.] was 18 years of age or older.

4. At the time of the offense, Garrett Statler was 18 years of age or older.

R. 162; *see also* Tr. 864.

As to the definition of consent, the trial court instructed the jury that "'[c]onsent' means intelligent, knowing, and voluntary consent and does not include coerced submission." R. 162; Tr. 864. "Consent does not mean the failure by the alleged victim to offer physical resistance to the offender." R. 162; Tr. 864.

In closing argument, defense counsel called A.B.'s testimony "not credible," Tr. 922, and contended that she consented to having sex with Petitioner. Tr. 939–45. In support of that theory, counsel pointed to A.B.'s brief interaction with the four men outside the apartment, during which she was allegedly flirtatious with all of them, Tr. 942–43, and to the small size of the apartment, from which counsel surmised that A.B. must have heard Petitioner's interactions with Tait, which could have alerted her that it was Petitioner and not Tait who reentered the room. Tr. 941. Counsel also argued that A.B. would not have orgasmed during sex with Petitioner—or asked him to go "harder"—if she did not realize she was having sex with Petitioner and not Tait. Tr. 939–40. As for why A.B. would fabricate these allegations, counsel hypothesized that A.B. found it rude that Petitioner allegedly asked her to abruptly leave the apartment after sex. Tr. 944.

Verdict and Sentencing. The jury found Petitioner guilty of sexual battery as charged, Tr. 967, rejecting the claim that A.B. had consented to having sex with Petitioner.

The case proceeded to sentencing. As for Petitioner's defense at

trial that he did not "intentionally or knowingly commit the crime," the trial court "[did not] believe a word of it." Tr. 1021–22. "There [was] nothing from" Petitioner's brief earlier interaction with A.B., the court found, "that would indicate to a reasonable person, this is someone who wants to have a sexual encounter with me." Tr. 1026; *see also* Tr. 1027 ("[N]or did he do anything that one would think an honorable and reasonable person would be to introduce, to speak, to have a conversation, to evaluate what is the status of this young lady."). Though the court found that Petitioner and Tait had not premeditated the rape, Petitioner nevertheless "t[ook] advantage of the moment as it presented itself to him." Tr. 1023–24. The crime, in other words, was knowing.

In any event, the trial court explained, "there are good policy reasons" for not requiring knowledge of nonconsent. Tr. 1029. It is not enough that a person "thought [a sexual partner] was on board"—"You need to make certain that, not that you just think it, but that you have the consent of the person with whom you are engaging in sexual activity." *Id.* "We place a burden there," the trial court reasoned, "and in a college town, I can tell you there are many, many

other cases where the wisdom of that policy is apparent." *Id.*

Yet the trial court ultimately sentenced Petitioner to a mere 18 months in prison, followed by 10 years of sex-offender probation. R. 191; Tr. 1032.

Appellate Proceedings. On appeal, Petitioner argued that Section 794.011(5)(b) is "facially unconstitutional" because it does not require proof that the defendant knew his victim did not consent. Init. Br., *Statler v. State*, No. 1D19-264, at 36–42 (filed Aug. 28, 2019). Alternatively, he asked the district court to "read [a] mens rea requirement into the statute." *Id.* at 42. But he acknowledged that the First District years ago had "endorsed the notion that 'whether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of sexual assault.'" *Id.* at 22 (quoting *Watson v. State*, 504 So. 2d 1267, 1269 (Fla. 1st DCA 1986)).[1]

[1] In support of his claim that the law was unconstitutional, Petitioner observed that some states instruct juries that they must find that "the conduct of the complainant would not have justified a reasonable belief that she consented." Init. Br., *Statler v. State*, No. 1D19-264, at 39 (filed Aug. 28, 2019). Yet Petitioner did not request such an instruction in the circuit court. *See* Tr. 776–81.

The district court affirmed. Applying its decision in *Watson*—which "ha[d] not been questioned for decades"—the court found that Section 794.011(5)(b) requires no proof of knowledge. App'x 4. As to Petitioner's claim that the law was facially unconstitutional because it violated the Due Process Clause, the court held that even with no *mens rea* requirement the statute does not penalize "innocent conduct," the problem this Court described in *State v. Giorgetti*, 868 So. 2d 512 (Fla. 2004). App'x 4. The First District also declined to certify a question of great public importance. *Id.*

This Court exercised discretionary review because the district court had expressly declared valid Section 794.011(5)(b).

STANDARD OF REVIEW

Questions of statutory interpretation are reviewed *de novo*. *Richards v. State*, 288 So. 3d 574, 575 (Fla. 2020). The constitutionality of a state statute is also reviewed *de novo*. *Jackson v. State*, 191 So. 3d 423, 426 (Fla. 2016).

ARGUMENT

I. Section 794.011(5)(b) does not require knowledge of the victim's nonconsent.

The Court should approve the First District's decision. Petitioner's jury was properly instructed, as knowledge of nonconsent is not an element of sexual battery under Section 794.011(5)(b). But even if error occurred, Petitioner still is entitled to no relief because the State offered sufficient evidence to establish Petitioner's knowledge, and because no rational jury could have failed to find that element.

A. Subjective knowledge is not required.

Statutory text and context, case law, tradition, purpose, and practical considerations all confirm that Section 794.011(5)(b) does not require proof that Petitioner knew A.B. did not consent.

1. The text of Section 794.011(5)(b) does not require knowledge, whereas the text of other subsections of the statute does.

a. This Court "adhere[s] to the 'supremacy-of-text principle.'" *Advisory Op. to the Governor re: Implementation of Amendment 4*, 288 So. 3d 1070, 1078 (Fla. 2020). In interpreting a statute, the Court gives the text "its plain and ordinary meaning" and "is not 'at liberty

to add words . . . that were not placed there by the Legislature.'" *McDade v. State*, 154 So. 3d 292, 297 (Fla. 2014). The text of Section 794.011(5)(b) does not require prosecutors to prove the defendant knew his victim did not consent.

The statute provides:

> A person 18 years of age or older who commits sexual battery upon a person 18 years of age or older, without that person's consent, and in the process does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.

§ 794.011(5)(b), Fla. Stat. That language contains none of the usual phrases denoting a *mens rea* requirement. It does not, for example, require that an offender act "purposely," "knowingly," "recklessly," or "negligently." Model Penal Code § 2.02(1). Nor does it require "willfulness" or "intent." Instead, it is enough that the defendant act "without [the victim's] consent"—whether or not he knows that he lacked the victim's consent.

As reflected in the standard jury instructions, *see Gutierrez v. State*, 177 So. 3d 226, 230 (Fla. 2015) ("Standard jury instructions are presumed correct . . . ."), the statute requires only four things:

1. (Defendant) committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].

2. (Defendant's) act was committed without the consent of (victim).

3. At the time of the offense, (victim) was 18 years of age or older.

4. At the time of the offense, (defendant) was 18 years of age or older.

Fla. Std. Jury Instr. (Crim.) 11.4. From its adoption in 1981 until now, that standard jury instruction has not required knowledge, and no court has ever hinted that it is incorrect.

Here, prosecutors satisfied those elements by proving that Petitioner had sex with the victim without her consent by impersonating a man with whom the victim had earlier had sex.

b. Statutory context drives home the point. *See Advisory Op. to the Governor*, 288 So. 3d at 1079 ("[I]t is a 'fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.'"). Indeed, when elsewhere in Section 794.011 the Legislature intended to require knowledge, it said so expressly.

Petitioner's offense, appearing in subsection (5)(b) of the sexual-battery statute, is a second-degree felony. Subsection (4), on the other hand, sets out seven circumstances in which the crime constitutes a first-degree felony. Those provisions are a useful comparator because like subsection (5)(b) they require the State to prove that the victim did not consent. But unlike subsection (5)(b), two of those circumstances expressly incorporate a knowledge requirement:

Knowledge Required	
§ 794.011(4)(e)5.	"The victim is mentally defective, and the offender *has reason to believe this or has actual knowledge of this fact.*" (emphasis added)
§ 794.011(4)(e)4.	"The offender, without the prior knowledge or consent of the victim, administers *or has knowledge of someone else administering* to the victim any narcotic, anesthetic, or other intoxicating substance that mentally or physically incapacitates the victim." (emphasis added)

In both subsections, an offender's liability turns on his knowledge of the attendant circumstances involving nonconsent. In subsection (4)(e)5., an offender must either have "actual knowledge of" the victim's mental defect or "reason to believe" that fact. And in

subsection (4)(e)4., the offender must have either administered to the victim an intoxicating substance or "ha[ve] knowledge of someone else administering" the substance.[2]

The inclusion of an explicit knowledge requirement in subsection (4)(e)5. is particularly probative. That subsection was

[2] By contrast, the remaining offenses in subsection (4) make no reference to the offender's mental state:

Knowledge Not Required	
§ 794.011(4)(e)1.	"The victim is physically helpless to resist."
§ 794.011(4)(e)2.	"The offender coerces the victim to submit by threatening to use force or violence likely to cause serious personal injury on the victim, and the victim reasonably believes that the offender has the present ability to execute the threat."
§ 794.011(4)(e)3.	"The offender coerces the victim to submit by threatening to retaliate against the victim, or any other person, and the victim reasonably believes that the offender has the present ability to execute the threat."
§ 794.011(4)(e)6.	"The victim is physically incapacitated."

Thus, courts have properly understood that those subsections require no proof that the defendant was aware of the attendant circumstances that make the offense a first-degree felony. *See Abdallah v. State*, 2021 WL 6057100, No. 3D19-1581, at *5 (Fla. 3d DCA Dec. 22, 2021) (rejecting special jury instruction that defendant must have known the victim was "physically helpless to resist" because "[t]he law's focus is on whether the victim consented and not on the perpetrator's state of mind").

included in the same 1974 enactment that created what is now subsection (5)(b). *See* Ch. 74-121, § 2, Laws of Fla. (creating what were then-Sections 794.011(4)(f) & (5), Fla. Stat. (1974)). And yet since the law's inception, subsection (5)(b) has never required knowledge, whereas subsection (4)(e)5. always has.[3]

It therefore stands to reason that the Legislature dispensed with a knowledge requirement in subsection (5)(b). *See State v. Yanez*, 716 A.2d 759, 766 (R.I. 1998) (finding no knowledge requirement in Rhode Island's sexual-assault statute because the "decision to include a *mens rea* requirement in [some subsections] while declining to provide a *mens rea* requirement in [others], demonstrates that the Legislature's omission was intentional"); *Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla. 1997) ("[W]here [the Legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [it] acts intentionally and purposely in the disparate inclusion or exclusion.").

[3] Other sections of Chapter 794 likewise expressly require that an offender act "willfully and knowingly," § 794.024(1), Fla. Stat. (criminalizing the unlawful disclosure of identifying information), or "knowingly." § 794.08(2)–(4), Fla. Stat. (criminalizing female genital mutilation).

Were it otherwise, the Legislature would have used terms like "actual knowledge of this fact," "reason to believe," or "has knowledge of." § 794.011(4)(e)4. & (4)(e)5., Fla. Stat. And indeed, it did just that in a separate chapter of the Florida Statutes when defining the crime of lewd or lascivious battery on an elderly or disabled person, criminalizing such conduct when the offender "knows or reasonably should know that" the victim "fails to give consent." § 825.1025(2)(a), Fla. Stat.[4]

c. Panning out from Florida, when the legislatures of other states

[4] Further contextual clues bolster that conclusion. Section 794.011's definition of the term "consent" clarifies that a victim has no duty to physically resist an assailant, a requirement that might otherwise be thought to put an assailant on notice of the victim's nonconsent. § 794.011(1)(a), Fla. Stat. ("'Consent' shall not be deemed or construed to mean the failure by the alleged victim to offer physical resistance to the offender."). Similarly, the statute defines "physically helpless" to mean "unconscious, asleep, or for any other reason physically *unable to communicate willingness to an act*." § 794.011(1)(e), Fla. Stat. (emphasis added). Read together, these definitions suggest the Legislature required a person to obtain a partner's consent, by word or deed, before engaging in sexual activity. *See also infra* 37–41 (explaining that consent is an objective concept that exists when a person's objective conduct would reasonably convey a willingness to have sex). In that light, it makes sense that knowledge is irrelevant to liability under Section 794.011(5)(b): a person who makes no effort to obtain consent assumes the risk that consent is lacking.

have required knowledge in their sexual-battery statutes, they generally do so expressly. *See Commonwealth v. Lopez*, 745 N.E.2d 961, 967 (Mass. 2001) ("States that recognize a mistake of fact as to consent generally have done so by legislation."). Examples include:

States Expressly Requiring Knowledge	
Arizona	"A person commits sexual assault by *intentionally or knowingly* engaging in sexual intercourse or oral sexual contact with any person without consent of such person." Ariz. Rev. Stat. § 13-1406(A).
Colorado	"Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if . . . [t]he actor *knows* that the victim does not consent." Colo. Rev. Stat. Ann. § 18-3-404(1)(a).
Delaware	"A person is guilty of unlawful sexual contact in the third degree when the person has sexual contact with another person or causes the victim to have sexual contact with the person or a third person and the person *knows* that the contact is either offensive to the victim or occurs without the victim's consent." 11 Del. Code. § 767.
Hawaii	"A person commits the offense of sexual assault in the second degree if the person . . . [*k*]*nowingly* subjects another person to an act of sexual penetration by compulsion," Haw. Rev. Stat. § 707-731(1)(a), which is defined as the "absence of consent." Haw. Rev. Stat. § 707–700.
Kansas	Defining rape as "[*k*]*nowingly* engaging in sexual intercourse with a victim who does not consent

	to the sexual intercourse" in specified circumstances. Kan. Stat. Ann. § 21-5503(a)(1).
Missouri	"A person commits the offense of rape in the second degree if he or she has sexual intercourse with another person *knowing* that he or she does so without that person's consent." Mo. Ann. Stat. § 566.031(1).
Montana	"A person who *knowingly* subjects another person to any sexual contact without consent commits the offense of sexual assault." Mont. Code Ann. § 45-5-502(1).
Ohio	"No person shall have sexual contact with another [when the] offender *knows* that the sexual contact is offensive to the other person, or one of the other persons, *or is reckless* in that regard." Ohio Rev. Code Ann. § 2907.06(a)(1).
Tennessee	"The sexual contact is accomplished without the consent of the victim and the defendant *knows or has reason to know* at the time of the contact that the victim did not consent." Tenn. Code Ann. § 39-13-505(a)(2).
Texas	"A person commits an offense . . . if the person . . . *intentionally or knowingly* . . . causes the penetration of the anus or sexual organ of another person by any means, without that person's consent." Tex. Penal Code Ann. § 22.021(a)(1)(A)i (all emphasis above added).

Each of those statutes expressly places at issue the defendant's mental state. Had the Florida Legislature wished to do the same in Section 794.011(5)(b), it could have copied the approach of these

other states.

2. For decades, courts have interpreted Section 794.011 in this way.

For nearly four decades, courts have recognized that a defendant's subjective knowledge is irrelevant to the nonconsent element shared by offenses throughout Section 794.011. *See, e.g.*, *Watson v. State*, 504 So. 2d 1267 (Fla. 1st DCA 1986). In 1986, for example, the First District construed Section 794.011(3), which at the time criminalized "commit[ting] sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury shall be guilty of a life felony." § 794.011(3), Fla. Stat. (1983). The court held that "whether a defendant knew or should have known that the victim was refusing sexual intercourse is not an element of the crime of sexual assault." *Watson*, 504 So. 2d at 1269. It therefore "f[ou]nd no error in the trial court's refusal to go beyond the standard jury instruction." *Id.*

The U.S. Court of Appeals for the Eleventh Circuit agreed when it rejected Watson's federal habeas petition. *See Watson v. Dugger*,

945 F.2d 367, 370 (11th Cir. 1991). The court held that "sexual battery is a general intent crime" in Florida, meaning "[t]he State need not demonstrate a specific intent[5] on the part of the defendant to engage in sexual conduct without the consent of the victim." *Id.* (citation omitted)); *see also Jackson v. State*, 640 So. 2d 1173, 1174 (Fla. 2d DCA 1994) (holding that defense counsel was not ineffective in failing to request an intent instruction under subsection (3), because "[s]tate of mind is not a material fact in a sexual battery charge, nor is intent an issue"). In other words, the court recognized that sexual battery in Florida—absent express language to the contrary—does not require the State to prove that the defendant subjectively knew that the victim did not consent.

As the First District correctly pointed out in the decision below, this case law "has not been questioned for decades." App'x 4.

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[5] Although this Court's modern jurisprudence uses "specific intent" as a term of art referring to a "special mental element which is required above and beyond any mental state required with respect to the *actus reus* of the crime," *Frey v. State*, 708 So. 2d 918, 919 (Fla. 1998)—*e.g.*, burglary, which requires both an unlawful entering of property *and* an intent to commit an offense thereon—at common law the terms "specific intent" and "general intent" referred to various forms of *mens rea*.

More recently, courts have held that knowledge is irrelevant to other subsections of Section 794.011 requiring nonconsent, including subsection (5)(b). The Fourth District interpreted subsection (5)(b) in *Reyna v. State*, 302 So. 3d 1025, 1033 (Fla. 4th DCA 2020), *rev. denied*, No. SC20-1666, 2021 WL 1590003 (Fla. Apr. 22, 2021). There, the defendant challenged his conviction because, in his view, the trial court erred in introducing collateral-crimes evidence of earlier sexual assaults he had committed. In remanding for a new trial, the Fourth District held that the collateral crimes were irrelevant because the defendant's knowledge was beside the point. *Id.* at 1033. "[M]istake is not a defense to sexual battery," the Fourth District wrote, and "a defendant cannot avoid criminal responsibility for attacking the victim by saying that he thought he was having consensual sex with his wife." *Id.*

The Eleventh Circuit adopted the same reading in *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 917 (11th Cir. 2004). Assessing the elements of sexual battery under subsection (5)(b), the court held—consistent with "Florida's criminal statute defining sexual battery and Florida Pattern Jury Instruction 11.4"—that sexual

battery requires "a showing of only (1) sexual penetration and (2) a lack of consent." *Id.*

And just a few months ago, the Third District interpreted the related sexual-battery offense contained in subsection (4)(e)1. and held that a defendant needs no awareness that the victim was "physically helpless to resist." *Abdallah v. State*, No. 3D19-1581, 2021 WL 6057100, at *5 (Fla. 3d DCA Dec. 22, 2021). The court reasoned that "[s]tate of mind is not a material fact in a sexual battery charge, nor is intent an issue." *Id.* Rather, "[t]he law's focus is on whether the victim consented and not on the perpetrator's state of mind." *Id.*

Florida's approach is no outlier. Instead, many courts interpreting similar statutes in other states have likewise held that knowledge of nonconsent is irrelevant. *See, e.g.*, *People v. Witte*, 449 N.E.2d 966, 971 n.2 (Ill. Ct. App. 1983) ("However, the only intent necessary to support rape is the *general* intent to perform the physical act; whether the defendant intended to commit the offense[s] without the victim's consent is not relevant, the critical question being whether the victim did, in fact, consent."); *State v. Christensen*,

414 N.W.2d 843, 845–46 (Iowa Ct. App. 1987) ("[D]efendant's awareness of a putative sexual abuse victim's lack of consent is not an element of third-degree sexual abuse . . . . [I]t follows from this premise that a defendant's mistake of fact as to that consent would not negate an element of the offense."); *State v. Wenthe*, 865 N.W.2d 293, 302 (Minn. 2015) (only intent necessary in rape statute is intent to penetrate); *Keys v. State*, 219 So. 3d 559, 565 (Miss. Ct. App. 2017) ("Keys's pro se brief also makes a variety of arguments to the effect that there was insufficient evidence of his 'intent' or 'specific intent' because no witness testified about Keys's 'mind set' or 'state of mind.' These arguments are without merit. The State was only required to prove beyond a reasonable doubt that Keys penetrated AKT without her consent and not by mistake or accident."); *State v. Ayer*, 612 A.2d 923, 926 (N.H. 1992) ("No statutory authority, therefore, exists for a requirement that the defendant actually know that the victim did not consent."); *State v. Elmore*, 771 P.2d 1192, 1193–94 & n.5 (Wash. Ct. App. 1989) ("[T]he Legislature chose not to include a degree of culpability as an element of rape; instead, it specifically included lack of consent . . . . For policy reasons it makes sense that the Legislature

would focus on the issue of the victim's consent, or rather lack thereof, rather than the perpetrator's subjective assessment of the situation. To do otherwise would lead to the ludicrous result that a perpetrator could be exonerated simply by arguing that he did not know the victim's expressed lack of consent was genuine or that he did not intend to have nonconsensual sexual intercourse with the victim."); *State v. Lederer*, 299 N.W.2d 457, 460–61 (Wis. Ct. App. 1980) (holding that "no knowledge or intent is required" as to victim's nonconsent).

3. Florida has historically dispensed with knowledge requirements in the rape context.

Section 794.011 was enacted in 1974. That enactment came against the backdrop of Florida's long tradition of dispensing with knowledge requirements in the context of anti-rape legislation, and Section 794.011(5)(b) tracks that practice.

As many courts have recognized, rape at common law was a strict-liability crime. *Elmore*, 771 P.2d at 1193 (explaining that "the elements of rape at common law were carnal knowledge, force, and commission of the act against the will of the victim," and that "no intent was requisite other than that evidenced by the acts

constituting the offense"); *Commonwealth v. Lopez*, 745 N.E.2d 961, 966 (Mass. 2001) ("Rape, at common law and pursuant to G.L. c. 265, § 22, is a general intent crime[.]"). Since at least the nineteenth century, Florida has employed that approach, "recogniz[ing] statutory rape as a strict liability crime." *Feliciano v. State*, 937 So. 2d 818, 820 (Fla. 1st DCA 2006). For example, this Court examined Florida's statutory rape law in 1891—which at the time required a showing of carnal intercourse with an unmarried female under 17 years of age—and held that an offender "will not be allowed to excuse himself by asserting ignorance as to her age." *Holton v. State*, 9 So. 716, 717 (Fla. 1891).

Fifty years later, the Court considered a statutory-rape statute making it a crime to have "carnal intercourse with an unmarried female under the age of eighteen years and of previous chaste character." *Simmons v. State*, 10 So. 2d 436, 437 (Fla. 1942). The defendant contended at trial that he learned of the victim's virginity during the assault and desisted immediately, but the trial court refused to instruct the jury that his knowledge of that fact was relevant. *Id.* at 437–38. This Court affirmed the conviction. It held

that neither "ignorance or mistake on the part of the defendant as to her age" nor "lack of knowledge of previous chastity" excused the defendant of liability. *Id.* at 438. Rather, the Court explained, the purpose of the statute was "protecting the virginity of young maidens and 'the precise thing intended to be discouraged, and punished if committed, is sexual intercourse with them.'" *Id.* The statute therefore fell "within the category of crimes 'in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act.'" *Id.*

Three decades after that, this Court again reiterated that "[i]n the instance of statutory rape it is no defense that the defendant actually believed the female to be in excess of the prohibited age." *Baker v. State*, 377 So. 2d 17, 19 (Fla. 1979).[6]

This lengthy tradition is relevant in two ways. First, it shows

[6] As this understanding was crystalizing in Florida, the U.S. Supreme Court itself acknowledged that rape was a strict-liability offense. *See Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952) ("Exceptions came to include sex offenses, such as rape, in which the victim's actual age was determinative despite defendant's reasonable belief that the girl had reached age of consent.").

that, as a general matter, Florida's sexual-assault laws have historically incorporated strict-liability principles to protect the bodily integrity and sexual autonomy of victims. Section 794.011(5)(b) simply carries on that practice.

In fact, by omitting a knowledge requirement, Section 794.011(5)(b) parallels the statutory rape law in effect in 1974 when Section 794.011 was enacted. That law made it a second-degree felony to "ha[ve] unlawful carnal intercourse with any unmarried person, of previous chaste character, who at the time of such intercourse is under the age of eighteen years." § 794.05, Fla. Stat. (1974). Like Section 794.011(5)(b), the text of that statute was simply "silent as to the requirement of any [mental state]" that had to accompany the elements of "age" and "previous chaste character." *Simmons*, 10 So. 2d at 438. Given that silence, this Court interpreted the law to impose strict liability: "ignorance or mistake on the part of the defendant as to [the victim's] age would hav[e] been no excuse," just as "lack of knowledge of previous chastity would have been of no avail." *Id.* Section 794.011(5)(b) fits within this settled approach to sexual-assault crimes.

Second, and more specifically, this tradition demonstrates that Florida's sexual-assault laws have generally not required that the defendant have actual knowledge of the victim's nonconsent. Statutory-rape laws used age as a proxy for consent, reflecting the judgment that minors are too young to form valid consent. *See Schang v. State*, 31 So. 346, 347 (Fla. 1901) ("In such cases the law presumes that a child of such immature age is incapable of either consenting to or protesting against the act, . . ."); *State v. Bowden*, 18 So. 2d 478, 481 (Fla. 1944) ("[T]he law presumes that a female falling within the protected class defined by statute shall be legally incapable of consenting to or protesting against the act."). Just as statutory-rape laws dispensed with knowledge of the victim's age—and thus whether the victim was capable of consent—so too does Section 794.011(5)(b) dispense with any requirement that the defendant subjectively know of the victim's nonconsent.

4. This reading advances Section 794.011(5)(b)'s purpose of safeguarding bodily and sexual autonomy.

That reading comports with the manifest purpose undergirding Section 794.011(5)(b): protecting Florida residents from unwanted

sexual contact. *See Sch. Bd. of Orange Cnty. v. Palowitch*, 367 So. 2d 730, 732 (Fla. 1979) (preferring a reading of a statute that will "advance such purposes" rather than one "which promises to frustrate the purposes of the Act").

In criminalizing a range of sexual batteries, the Legislature has exhibited the utmost concern for the "sexual bodily security and integrity" of its citizens. *Collins v. Rizkana*, 652 N.E.2d 653, 658 (Ohio 1995). As this Court has noted, sexual battery and rape are "a gross invasion of the privacy of one's body which cannot be tolerated by a civilized society." *Washington v. State*, 302 So. 2d 401, 403 (Fla. 1974). And such invasions can be significantly more traumatic than other violent offenses, with the prevalence of post-traumatic stress disorder in survivors of non-sexual-assault traumas ranging from 12% to 24%, but at *80%* for sexual-assault survivors.[7] Rape is the most common cause of PTSD in women,[8] and 23–44% of sexual-

[7] Dworkin et al., *Sexual Assault Victimization and Psychopathology: a Review and Meta-Analysis*, 56 Clin. Psychol. Rev. 65–81, at *2 (Aug. 2017) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5576571/pdf/nihms891476.pdf (author manuscript).

[8] *Id.* at *2.

assault survivors experience suicidal ideation, with up to 19% actually attempting suicide.[9]

Moreover, the incidence of sexual assault may be staggering. Though concrete statistics are hard to come by, upper estimates predict that 20–25% of college women will suffer some form of sexual assault,[10] while other studies suggest that 17–25% of women and 1–3% of men will be sexually assaulted in their lifetime.[11] Yet only 7 in every 1,000 rapes are punished, a rate greatly below the 22 in 1,000

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[9] *Id.* at *3.

[10] Fisher et al., *Research Report: The Sexual Victimization of College Women*, National Institute of Justice & U.S. Dep't of Justice Bureau of Justice Statistics, at 10 (Dec. 2000), https://www.ojp.gov/pdffiles1/nij/182369.pdf; *see also* Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, Ass'n of Am. Universities, at ix, https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf (estimating that 25.9% of college women experience nonconsensual sexual contact by force or inability to consent); Zinzow et al., *Prevalence and Risk of Psychiatric Disorders as a Function of Variant Rape Histories: Results from a National Survey of Women*, 47(6) Soc. Psychiatry Psychiatr. Epidemiol. 893–902, at *1 (June 2012) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4096823/pdf/nihms596203.pdf (author manuscript). (lifetime prevalence among women estimated to be between 12–18%).

[11] Dworkin et al., *supra*, at 2.

robberies and 41 in 1,000 assault and batteries that are.[12]

Section 794.011(5)(b) was meant to combat this scourge. A bill summary for HB 3764, which became the chapter law enacting Section 794.011, observed that "[i]n recent months and years there has been a dramatic increase in the number of reported rapes and sexual assaults." Bill Summary, HB 3764 (May 7, 1974). "Because of the apparent reluctance on the part of juries to convict for rape, the creation of a crime at a level in between rape and ordinary battery has been proposed." *Id.*

Other amendments to Chapter 794 eliminated existing evidentiary impediments to sexual-battery prosecutions, including amendments:

- Adopting and then strengthening the rape shield law, *see* Ch. 74-121, § 2, Laws of Fla. (adding § 794.022(2), Fla. Stat.); Ch. 83-258, § 1, Laws of Fla. (amending § 794.022(2), Fla. Stat.);

- Barring the introduction of evidence of the victim's dress as proof that the victim "incited the sexual battery," *see* Ch. 90-40, § 1, Laws of Fla. (adding § 794.022(3), Fla. Stat.);

- Prohibiting the drawing of any inference about consent drawn from the fact that a victim requested an attacker use a prophylactic device, *see* Ch. 94-80, § 1, Laws of Fla. (adding §

[12] Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 Am. Crim. L. Rev. 259, 259 (2018).

794.022(5), Fla. Stat.); and

- Clarifying that a victim's failure to forcibly resist an attacker does not constitute consent. *See* Ch. 92-135, § 2, Laws of Fla. (adding § 794.005, Fla. Stat.).

These amendments—and the text of the sexual-battery statute itself—underscore the Legislature's commitment to stamping out sexual violence in Florida.

But while any sound sexual-assault statute "target[s] the social harm of unwanted sex," Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 Am. Crim. L. Rev. 259, 279, 281 (2018), "[d]efining the crime of rape as requiring that the defendant [subjectively] knew of the facts of [nonconsent] is yet one more layer of proof that removes the crime from targeting unwanted sex." *Id.* at 286. It is therefore exceedingly unlikely that the Legislature meant to take that approach.

5. The objective nature of consent confirms that knowledge is not an element.

Finally, courts and commentators have recognized that an offender's "opportunity to ascertain the true facts" is a consideration that "may be important in determining whether the legislature really meant to impose liability on one who was without fault because he

lacked knowledge of these facts." LaFave, 1 Subst. Crim. L. § 5.5(a) (3d ed.). "The harder to find out the truth, the more likely the legislature meant to require fault in not knowing; the easier to ascertain the truth, the more likely failure to know is no excuse." *Id.*; *see also United States v. Balint*, 258 U.S. 250, 254 (1922) ("Do[u]btless considerations as to the opportunity of the seller to find out the fact and the difficulty of proof of knowledge contributed to this conclusion.").

Applying that principle here, subsection (5)(b) affords a ready opportunity to ascertain the fact of nonconsent, confirming that independent proof of knowledge is not an element.

Consent is evaluated on an objective basis. As Petitioner himself observes (Init. Br. 33–34), "[w]hile the word 'consent' is commonly regarded as referring to the state of mind of the complainant in a sexual assault case, it cannot be viewed as a wholly subjective concept." *State v. Smith*, 554 A.2d 713, 717 (Conn. 1989). Under the objective view of consent, "a defendant is not chargeable with knowledge of the internal workings of the minds of others except to the extent that he should reasonably have gained such knowledge

from his observations of their conduct." *Id.* Instead, "whether a complainant has consented to intercourse depends upon her manifestations of such consent as reasonably construed." *Id.* That is, where the "conduct of the complainant under all the circumstances should reasonably be viewed as indicating consent to the act of intercourse," the complainant is deemed to have consented. *Id.*

The Eleventh Circuit, interpreting Section 794.011, made the same point:

> Florida law starts with the supposition that all sexual contact must be consensual. "Consent" is a term of communication. An individual consents to something by giving some affirmative indication of their approval, either verbally or through their actions. Consent, therefore, requires some kind of overt gesture sanctioning or endorsing the proposed conduct. When the jury finds a "lack of consent," it necessarily determines that there was no communication between the victim and the defendant on this issue, and no affirmative or overt indication of approval. By finding a lack of consent, the jury establishes that the victim neither verbally nor through actions gave the defendant any reason to believe that permission was given to engage in intercourse. For the jury to find that the defendant had an objectively reasonable, good-faith belief that the victim consented would require it to find that the victim communicated approval or assent in some manner. The jury's finding of lack of consent, however, precludes any such finding.

Watson, 945 F.2d at 370–71.[13]

That objective-consent requirement means that Section 794.011(5)(b) does not penalize unwitting conduct, and therefore is not a true strict-liability offense. A jury's finding of guilt—which necessarily includes the finding that the victim did not consent—equals a finding that the victim made "no affirmative or overt indication of approval" upon which the defendant reasonably could have relied in thinking he had obtained consent. *Id.* at 370. Because the defendant can perceive the victim's outward manifestations of consent (or lack thereof), the element of objective consent itself

[13] Many other jurisdictions take this approach. *See, e.g.*, *Russell v. United States*, 698 A.2d 1007, 1016 n.12 (D.C. 1997) ("The correct standard under the new statute is whether a reasonable person would think that the complainant's 'words or overt actions indicate[d] a freely given agreement to the sexual act or contact in question.'"); *People v. Smith*, 638 P.2d 1, 6 (Colo. 1981) ("Whether consent existed at the relevant time is an objective fact, not something which can be varied by a later decision of the victim."); *State v. Ayer*, 612 A.2d 923, 926 (N.H. 1992) ("The appropriate inquiry is whether a reasonable person in the circumstances would have understood that the victim did not consent."); *see also* Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 Yale L.J. 2687, 2697 (1991) ("Courts do not ask victims and defendants about their subjective beliefs and feelings when evaluating consent and intent. As in other legal areas, they rely on objective manifestations of subjective states when evaluating a rape allegation.").

ensures that the statute criminalizes only blameworthy conduct (having sex with a person without an objective manifestation of consent).

Because the objective nature of consent means potential offenders enjoy the "opportunity to ascertain the true facts," it is unsurprising that Section 794.011(5)(b) dispenses with a knowledge requirement. Petitioner could have requested, yet did not, an instruction on the objective nature of consent.

B. Petitioner's arguments lack merit.

Petitioner argues that Section 794.011(5)(b) requires a showing of "knowledge of nonconsent." Init. Br. 20. When knowledge relates to the nature of an offender's conduct or of the attendant circumstances of the offense, it is commonly defined as an "aware[ness] that [the] conduct is of that nature or that such circumstances exist." Model Penal Code § 2.02(2). That is, Petitioner claims he must have been subjectively aware that A.B. did not consent. But Petitioner makes no effort to show that the text or context of Section 794.011(5)(b) require knowledge; that any court has interpreted the law's text consistent with his view; that Florida

tradition or history favors him; or even that his reading of the law comports with Section 794.011(5)(b)'s overarching purpose. The arguments he does raise lack merit.

1. Petitioner relies principally on a so-called "virtual presumption" that all criminal laws require knowledge "absent an express provision to the contrary." Init. Br. 23. But "the legislature has the prerogative to define or redefine the elements of a crime." *State v. Hubbard*, 751 So. 2d 552, 561 (Fla. 1999); *see also State v. Giorgetti*, 868 So. 2d 512, 515 (Fla. 2004) (discussing the Legislature's "broad authority" to decide what if any mental state to require for a crime). Thus, the "preference in favor of" a knowledge element can be overcome by "some indication"—"express or implied"—that the Legislature meant to "dispense with *mens rea* as an element of a crime." *Giorgetti*, 868 So. 2d at 515 (quotations omitted).

The textual, contextual, historical, and other indications described above all reflect that the statute requires no knowledge of nonconsent. In particular, the Legislature's decision to require awareness related to consent in subsections (4)(e)4. and (4)(e)5. is

proof that its omission of a knowledge requirement from subsection (5)(b) was intentional. And requiring knowledge would put Section 794.011(5)(b) at odds with Florida's more-than-a-century-long traditions and the Legislature's own demonstrated concern for the sexual autonomy of Florida residents. Petitioner's invocation of the presumption would also defy the U.S. Supreme Court's observation that "sex offenses" are a "recognized" exception to the presumption, *Morissette v. United States*, 342 U.S. 246, 251 n.8 (1952), and would overlook that the objective nature of consent means that his conduct was not blameless, eliminating any need for the presumption.

Even if this were otherwise a close case on the presumption, the Court should only rarely undertake the dubious project of reading words into a statute. *See McDade*, 154 So. 3d at 297. That is so for three reasons.

First, courts apply statutory text, not rewrite it. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) ("[T]he courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications."). In that vein, Justice Scalia could think

of "no justification . . . for finding an intent requirement not expressed or textually implied." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 306 (2012). Instead, the "only certain ground[]" for discerning a *mens rea* requirement "not expressly contain[ed]" in the text of a statute is where a statute reflects a "statutory embodiment of a common-law crime" that itself required *mens rea*. *Id.* When that occurs, courts safely infer that the Legislature meant to keep in place the common-law features of the crime—an application of the canon of imputed common-law meaning. *Id.*; *see Morissette*, 342 U.S. at 250. Here, of course, tradition reflects that the Legislature would *not* have intended to include a knowledge requirement, as rape was historically a strict-liability crime. *Supra* 29–33.

Second, if anything, a default assumption imposing knowledge requirements deviates from common legislative practice. "It is rare if ever that the legislature states affirmatively in a statute that described conduct is a crime though done without fault." LaFave, *supra*, § 5.5(a). "What it does," Professor LaFave had noted, "is simply omit from the wording of the statute any language ('knowingly,'

'fraudulently,' 'wilfully,' 'with intent to,' etc.) indicating that fault is a necessary ingredient." *Id.*

Thus, this Court wrote in *Simmons* that it was "not unusual" for the Legislature to enact a strict-liability law—there, statutory rape—through its "silen[ce]" on the issue of knowledge. 10 So. 2d at 438.[14]

Third, the presumption is inconsistent with the text of the Florida Criminal Code. In describing the "general purposes" of the Code, Section 775.012(3) indicates that the Code "define[s] clearly

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[14] The Legislature's approach to the mistake-of-age defense underscores that knowledge is usually dispensed with silently in sexual-assault crimes. Indeed, "[u]ntil the 1960s, . . . silence universally conveyed a rejection of the mistake of age defense" to statutory rape. Kathleen Houck, Note, *"Mistake of Age" As A Defense?: Looking to Legislative Evidence for the Answer*, 55 Am. Crim. L. Rev. 813, 813–15 (2018). In 1964, however, the California Supreme Court held that mistake of age was a valid defense, *People v. Hernandez*, 393 P.2d 673, 678 (Cal. 1964), triggering a domino effect of similar determinations in other states. *See Garnett v. State*, 632 A.2d 797, 803–04 (Md. 1993) (collecting authorities). Presumably to avoid an improper judicial interpretation of Florida law, the Legislature departed from its typical practice and stated expressly that mistake of age is no defense to a charge of statutory rape. § 794.021, Fla. Stat. Importantly, though, it did not make a similar exception for the element of chastity in then-Section 794.05—an element for which, like mistake of age, a defendant could reasonably make a mistake of fact. Because there was no similar nationwide trend, the Legislature opted to rest on its silence, which Florida case law had correctly construed as establishing a strict-liability crime. *E.g.*, *Simmons*, 10 So. 2d at 438.

the material elements constituting an offense," including the "*accompanying state of mind or criminal intent* required for that offense." § 775.012(3), Fla. Stat. (emphasis added). Presumptively, then, a criminal statute means no more or less than what its text fairly conveys. That is especially true here: Section 775.012(3) was enacted in the same year as the sexual-battery law, *see* Ch. 74-383, § 2, Laws of Fla., and would have informed how legislators understood the elements of the offenses they were creating in Section 794.011.

None of this is to say that a knowledge requirement cannot be read into an ambiguous statute to avoid striking down the statute as unconstitutional. *See, e.g.*, *Romero v. State*, 314 So. 3d 699, 702 (Fla. 3d DCA 2021). But that saving construction makes little sense as a baseline rule, for the simple fact that not all statutes need saving. *See State v. Gray*, 435 So. 2d 816, 819 (Fla. 1983) ("[U]nless the law in question directly or indirectly impinges on the exercise of some constitutionally protected freedom, or exceeds or violates some constitutional prohibition on the power of the legislature, courts have no power to declare conduct innocent when the legislature has

declared otherwise.").

In short, Petitioner has not shown that this Court should apply the presumption of *mens rea* here.

2. Petitioner next urges the Court to adopt his atextual reading because case law interpreting the "inchoate offenses"—attempt, solicitation, and conspiracy—have required knowledge. Init. Br. 29–31. But in *Rogers v. State*, this Court explained that "[t]o establish attempt"—*any* attempt, not just attempted sexual battery—"the State must prove a specific intent to commit a particular crime and an overt act toward the commission of that crime." 660 So. 2d 237, 241 (Fla. 1995). The same is true of solicitation and conspiracy. *See The Fla. Bar v. Marable*, 645 So. 2d 438, 442 (Fla. 1994) (solicitation); *King v. State*, 104 So. 2d 730, 732 (Fla. 1957) (conspiracy). Thus, all those cases say is that an inchoate offense itself requires an additional intent—i.e., a specific intent—to complete the underlying offense, not that the underlying offense is a knowledge crime.

3. Petitioner likewise misreads (Init. Br. 31–32) the collateral-crimes case he relies on, *Williams v. State*, 621 So. 2d 413 (Fla. 1993). Though Petitioner contends that the collateral-crimes evidence there

was relevant to the defendant's state of mind, the Court instead found that evidence "relevant . . . to the issue of consent." *Id.* at 416. Thus, while the Court noted that the collateral crimes were proof of the defendant's "common plan or scheme," that plan or scheme merely "rebut[ted] Williams' defense that the complainant had consensual sex with him in exchange for drugs." *Id.* at 417. *Williams* says nothing of a knowledge element.

4. Next, Petitioner claims that because simple battery is a lesser-included offense of sexual battery, sexual battery must require knowledge. Init. Br. 32–33. But while Petitioner's premise is correct, his conclusion is not: *neither* of those offenses require knowledge. All that is required for simple battery is that the defendant (1) intentionally touch another (2) without that person's consent. § 784.03(1)(a)1., Fla. Stat.; *see, e.g.*, *State in Int. of M.T.S.*, 609 A.2d 1266, 1276 (N.J. 1992). Consent in the simple-battery context is evaluated using the same objective framework as for sexual battery.

Thus, if A tells B that C consents to being punched, and B goes into the other room to punch C, B cannot escape liability on the theory that he believed C consented.

5. Elsewhere Petitioner argues that Section 794.011(5)(b) must contain a knowledge requirement because in 1992 the Legislature amended the law to clarify that no force or violence is required "beyond the force and violence that is inherent in the accomplishment of 'penetration' or 'union.'" Init. Br. 24–29. In his view, before the amendment Section 794.011(5)(b) did *not* require knowledge, as "[t]he threat of use [of] a deadly weapon or use of force in section 794.011(3) . . . supplied the *mens rea* not contained in section 794.011(5)." *Id.* at 26. Afterwards, he says, the 1992 amendment "implicitly conveyed [the Legislature's] intent to require proof of knowledge of nonconsent," as the force requirement could no longer substitute for knowledge. *Id.* at 28–29.

Petitioner is right that a knowledge element was "not contained in section 794.011(5)" before 1992. *Id.* at 26. But he is wrong that the 1992 amendment changed anything. That amendment merely clarified that the Legislature had "never intended" that Section 794.011(5) required the use of force, a reaction necessitated by this Court's decision in *Gould v. State*, 577 So. 2d 1302 (Fla. 1991) (holding that subsection (5) required some force beyond that involved

in the act of penetration). And it strains belief to suggest that the 1992 amendment—which said nothing about knowledge or *mens rea*—silently added a knowledge requirement. To the contrary, the relevant language of Section 794.011(5)(b) ("without that person's consent") remained unchanged by the 1992 amendment.

If anything, by making clear that subsection (5)(b) is the "least serious" of the sexual-battery offenses, the amendment cuts the other way. § 794.005, Fla. Stat. It makes no sense that this *lower* degree of offense requires a *higher* mental state than its statutory companions. *See* § 794.011(4)(e)4., Fla. Stat. (requiring that the defendant "has knowledge of someone else administering" a debilitating drug to the victim); § 794.011(4)(e)5., Fla. Stat. (requiring that the defendant "ha[d] reason to believe" or "actual knowledge of" the victim's mental defect); *see also* Init. Br. 26 (contending that force or coercion element of other subsections of Section 794.011 "supplied" a knowledge element); *cf.* § 825.1025(2)(a), Fla. Stat. (criminalizing lewd or lascivious battery on an elderly or disabled person where the offender "knows or reasonably should know that" the victim "fail[ed] to give consent").

6. Last, Petitioner points to courts in other states that either have read into their statutes a knowledge requirement or made the commonsense observation that consent is an objective concept. Init. Br. 33–36. As discussed above, the State agrees with those courts that evaluate consent objectively. *See, e.g.*, *Smith*, 554 A.2d at 717; *State v. Koperski*, 578 N.W.2d 837, 637 (Neb. 1998). That does not aid Petitioner, however, because he did not request an instruction telling the jury that consent exists when a complainant's objective manifestations would have signaled to a reasonable person that he or she consented to intercourse.

As for jurisdictions that interpret their laws the way Petitioner would have this Court do, *see, e.g.*, *People v. Mayberry*, 542 P.2d 1337 (Cal. 1975), none construed the unique text, context, and history that should inform how *Florida's* statute must be read. And Petitioner overlooks the many out-of-state decisions refusing to read into sexual-assault statutes a knowledge element that the text of those statutes will not support. *Supra* 27–29.

* * *

Even assuming, however, that Petitioner is correct that some

mens rea applies to the attendant circumstance of a victim's nonconsent, that *mens rea* would be criminal negligence, not knowledge. And at most, the *mens rea* would be recklessness.

Though Petitioner cites (Init. Br. 33–34) a Connecticut case for the proposition that "knowledge" is required, the case actually holds that the lesser *mens rea* of criminal negligence suffices. *Efstathiadis v. Holder*, 119 A.3d 522, 529 (Conn. 2015). The court reached that result based on its view of "the general scope of the [statute] and the nature of the evils to be avoided." *Id.* at 527, 529. Like the Connecticut statute at issue there, the evil to be avoided in Section 794.011(5)(b) is not simply that offenders will knowingly or intentionally disregard the victim's nonconsent; it is that offenders will *unreasonably* disregard the victim's nonconsent, creating an intolerable risk of harm to the victim.

At the very least, the Model Penal Code makes clear that the standard should be no more stringent than recklessness. If some mental state must be read into a statute, the Code provides that the crime occurs if the defendant acted either "purposely, knowingly or *recklessly*." Model Penal Code § 2.02(3) (emphasis added). Any of the

three, according to the Code's drafters, would ordinarily justify imposing criminal penalties.

C. In no event is Petitioner entitled to judgment of acquittal or a new trial.

Even accepting Petitioner's reading of the statute, he is entitled to no relief.

1. Petitioner first contends that the trial court should have granted his motion for judgment of acquittal. Init. Br. 38–41. When reviewing the sufficiency of the evidence, an appellate court asks whether the State presented competent, substantial evidence to support the verdict. *Bush v. State*, 295 So. 3d 179, 200 (Fla. 2020). In reaching that judgment, the court must "view[] the evidence in the light most favorable to the State" and decide if a "rational trier of fact could have found the existence of the elements of the crime beyond a reasonable doubt." *Id.*

Taking all inferences in the State's favor, the evidence here was more than sufficient to prove Petitioner knew that consent had not been given. A.B. testified that:

- She agreed to have sex with Tait, not Petitioner, Tr. 234, 244–45, 290;

- Petitioner never announced himself upon entering the bedroom, and did not request her consent, Tr. 238;

- A.B. had no reason to believe that the man she was having sex with was not Tait, Tr. 238–39;

- She said or did nothing to Petitioner that could have been construed as manifesting her intent, *see* Tr. 235–39, and denied so much as flirting with Petitioner outside the apartment, Tr. 230; and

- When A.B. turned around and first saw Petitioner, he was "grinning like he knew he did something bad," Tr. 243, and was "waiting to see my reaction." Tr. 244.

The statute defines "consent" to require "intelligent, knowing, and voluntary consent," § 794.011(1)(a), Fla. Stat., and any reasonable person in Petitioner's position would have recognized that A.B. had not "intelligent[ly]" and "knowing[ly]" consented to sex with him.

Taking the evidence in the light most favorable to the State, the events in the living room of the apartment would only have supported a rational jury's conclusion that Petitioner knew that A.B. did not consent. According to Tait, when he left A.B. in the bedroom he bragged to Petitioner and Bedran about how good the sex was. Tr. 704. Tait then told Petitioner, "You could try if you want," meaning that Petitioner could "try to have sex with her if you'd like." Tr. 705. Far from showing that Petitioner might reasonably have

believed that A.B. consented to sex with him, Tait's statement reflected that Petitioner could at most "*try*" *to obtain* A.B.'s consent, not that she had already consented.

2. Petitioner's plea for a new trial fares no better. Init. Br. 41–43. As Petitioner acknowledges, he did not request an instruction telling the jury that his subjective knowledge of nonconsent was an element of the offense. Init. Br. 42. He thus can prevail only by establishing that the error was fundamental, meaning an error that "reach[es] down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Knight v. State*, 286 So. 3d 147, 151 (Fla. 2019).

Petitioner cannot meet that heavy burden. At most, he established a factual dispute on two fronts: (1) whether Petitioner flirted with Petitioner and the other men outside the apartment, *compare* Tr. 229–30, 696, *with* Tr. 792–94, 811–14, and (2) whether Tait implied to Petitioner that A.B. herself wanted him to go into the bedroom. *Compare* Tr. 705, *with* Tr. 833. It should go without saying that flirtation does not suffice for consent to sexual intercourse; and even an implication by Tait that A.B. was interested in sleeping with

Petitioner would not establish that A.B. *herself* consented. And because the jury would commonly understand that consent is an objective term requiring some communication by A.B. of an intent to engage in intercourse with Petitioner, its finding that A.B. did not consent is independent proof that the jury inevitably would have rejected Petitioner's theory that he lacked knowledge.

II. Section 794.011(5)(b) is constitutional.

That leaves only Petitioner's suggestion that the State's interpretation would render Section 794.011(5)(b) unconstitutional under the Due Process Clause. Init. Br. 36–38. He is wrong.

This Court has noted the "broad authority" of the Legislature "to determine any requirement for intent or knowledge in the definition of a crime." *Giorgetti*, 868 So. 2d at 515. Indeed, even those "[s]tatutes which impose strict criminal liability"—which this one does not truly do—"are nonetheless constitutional, particularly when the conduct from which the liability flows involves culpability or constitutes malum in se as opposed to malum prohibitum." *Baker,* 377 So. 2d at 19.

Citing the "wide latitude" lawmakers possess to "declare an

offense and to exclude elements of knowledge and diligence from its definition," the U.S. Supreme Court has reached the same result. *Lambert v. California*, 355 U.S. 225, 228 (1957); *see also* LaFave, *supra*, § 5.5(b) ("[T]he United States Supreme Court has recognized that as a general matter it is constitutionally permissible to enact strict-liability criminal statutes." (footnote omitted)). That Court has "never articulated a general constitutional doctrine of mens rea," *Powell v. Texas*, 392 U.S. 514, 535 (1968), and has rejected the notion that the Due Process Clause bars "punishment of a person for an act as a crime when ignorant of the facts making it so." *Williams v. North Carolina*, 325 U.S. 226, 238 (1945).

Thus, the Supreme Court has affirmed a defendant's state conviction for bigamy where the statute did not recognize the defense that the defendant lacked knowledge that the divorce of his first marriage was invalid, *id.*; affirmed a federal conviction despite the statute making no exception for sellers of drugs who did not know the illicit character of the items they sold, *Balint*, 258 U.S. at 252; and affirmed the imposition of damages for the felony of a "casual and involuntary trespass" when a defendant unknowingly cut or

assisted in cutting timber on state lands. *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 67–69 (1910).

"[O]n only one occasion" has the Supreme Court "struck down a strict-liability crime," and that case arose in "rather unusual circumstances." LaFave, *supra*, § 5.5(b) (citing *Lambert*, 355 U.S. 225); *cf. State v. Adkins*, 96 So. 3d 412, 419 (Fla. 2012) (Canady, J.) (noting that strict-liability offenses have been invalidated in only "a limited category of circumstances"). In *Lambert*, the Supreme Court considered a provision of the Los Angeles Municipal Code making it a crime for any person with a felony conviction to remain in Los Angeles city limits for five or more days without registering. 355 U.S. at 226. The Court held that the law violated Lambert's due process rights because it penalized "wholly passive" conduct—the "mere failure to register." *Id.* at 228–30. "Violation of its provisions," the Court stressed, "is unaccompanied by any activity whatever." *Id.* at 229.

Petitioner attempts to frame his conduct in this light, claiming that it was "innocent" and akin to "sexual activity between consenting adults." Init. Br. 25. But his actions were nothing of the sort: he

tricked A.B. into having sex with him without her consent. *See Elmore*, 771 P.2d at 1193 ("[H]aving sexual intercourse with another person without his consent could not reasonably be mistaken to be an innocent act."). And even if Petitioner somehow did not know that A.B. did not consent, his conduct—sexually penetrating A.B. without so much as identifying himself or giving her a chance to express a willingness to have sex—created an intolerable risk that she did not consent. The creation of that risk is not innocent either.[15]

Aside from that, Petitioner ignores that the "classic example[]" of a permissible strict-liability crime is one penalizing "intercourse with a female under a prescribed statutory age." *Baker*, 377 So. 2d at 19. "In the instance of statutory rape," this Court has explained, "it is no defense that the defendant actually believed the female to be in excess of the prohibited age." *Id.*; *see also id.* (noting that "*Regina v. Prince*, 13 Cox Crim.Cas. 138 (1875), early on settled the validity of statutory rape legislation"). The Supreme Court has likewise cited

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[15] At any rate, this Court has understood *Lambert*'s prohibition as limited to those crimes that "impose[] an affirmative duty to act and then penalize[] the failure to comply." *Giorgetti*, 868 So. 2d at 517 (quoting *State v. Oxx*, 417 So. 2d 287, 290–91 (Fla. 5th DCA 1982)); *see also Adkins*, 96 So. 3d at 420–21.

statutory rape laws as permissible strict-liability offenses. *See Morissette*, 342 U.S. at 251 n.8. If statutory rape is constitutional, Section 794.011(5)(b) must be as well.

And the sole authorities Petitioner cites (Init. Br. 37–38) in support of his theory that Section 794.011(5)(b) would be unconstitutional without a knowledge element—*Sult v. State*, 906 So. 2d 1013 (Fla. 2005), and *Robinson v. State*, 393 So. 2d 1076 (Fla. 1980)—have little to say about this situation. Both involved First Amendment overbreadth and Due Process Clause vagueness challenges. They did not hold that the absence of a knowledge requirement alone rendered a statute unconstitutional.

Finally, the objective nature of consent all but ensures that an offender's conduct is not "innocent": though subjective knowledge is not an independent element of the offense, the nonconsent element turns on objective proof that the victim outwardly manifested no consent to sexual intercourse, not on the victim's subjective intentions. The objective nature of consent therefore affords an offender the "opportunity to ascertain the true facts." LaFave, *supra*, § 5.5(a). In other words, whether Petitioner in fact knew that A.B. did

not consent, at a minimum he unreasonably ignored the absence of objective consent, and thus is not blameless. In this way, Section 794.011(5)(b) is not a true strict-liability offense.

CONCLUSION

Neither the text of Section 794.011(5)(b) nor the Due Process Clause excuses Petitioner's grievous invasion of A.B.'s bodily integrity. This Court should approve the First District's decision.

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Respectfully submitted,

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I certify that this brief was prepared in 14-point Bookman font, in compliance with Florida Rule of Appellate Procedure 9.210(a)(2) and contains 12,219 words.

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