

11.18 SEXUAL MISCONDUCT BY A PSYCHOTHERAPIST

§ 491.0112, Fla. Stat.**.

To prove the crime of Sexual Misconduct by a Psychotherapist, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) committed sexual misconduct with (victim).**
- 2. At the time, (defendant) was a psychotherapist.**

Give 3a or 3b as applicable.

- 3. a. At the time, (victim) was a client of (defendant).**
- b. (Victim) was a former client of (defendant) and the professional relationship was terminated primarily for the purpose of engaging in sexual contact.**

§ 491.0112(3), Fla. Stat.

It is not a defense that (victim) consented to any act that constitutes sexual misconduct.

“Sexual misconduct” means the oral, anal, or female genital penetration of another by, or contact with, the sexual organ of another or the anal or female genital penetration of another by any object.**

Give if applicable. Lakey v. State, 113 So. 3d 90 (Fla. 5th DCA 2013).

“An object” includes a finger.

“Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.**

“Psychotherapist” means any person licensed in Florida pursuant to Chapter 458 (medicine), Chapter 459 (osteopathic medicine), Part I of Chapter 464 (nursing), Chapter 490 (psychology), or Chapter 491 (clinical counseling or psychotherapy services); or any other person who provides or purports to provide treatment, diagnosis, assessment, evaluation, or counseling of mental or emotional illness, symptom, or condition.

“Client” means a person to whom the services of a psychotherapist are provided.

Give if applicable. § 491.0112(2), Fla. Stat.

If you find the defendant guilty of Sexual Misconduct by a Psychotherapist, you must then determine whether the State has proven beyond a reasonable doubt that the crime was committed by means of therapeutic deception.

“Therapeutic deception” means a representation to the client that sexual contact by the psychotherapist is consistent with or part of the treatment of the client.

Lesser Included Offenses

SEXUAL MISCONDUCT BY A PSYCHOTHERAPIST — 491.0112			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Unnatural and lascivious act*	800.02*	11.8*
	Attempt	777.04(1)	5.1

Comments

A second or subsequent offense bumps this crime up to a second-degree felony. As of November 2022, it was unclear whether the existence of a prior is an element or a recidivist factor to be proven to the trial judge under a preponderance of the evidence standard at sentencing. Generally, it would be improper to allow the jury to hear about a prior. Therefore, if the information or indictment contains an allegation of one or more priors, do not read that allegation and do not send the information or indictment into the jury room. If the defendant is found guilty and if the prior is treated as an element, the historical fact of a prior should be determined by the jury beyond a reasonable doubt in a bifurcated proceeding. *State v. Harbaugh*, 754 So. 2d 691 (Fla. 2000).

*The courts do not require the State to allege the defendant’s act was “unnatural” or “against the laws of nature” for § 800.02, Fla. Stat., to be given as a lesser-included offense. If the sexual activity involved penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should *not* be given as a lesser-included offense. However, if the sexual activity involved something other than penile-vaginal sexual intercourse (or contact), § 800.02, Fla. Stat. should be given as a lesser-included offense. See *State v. Knighton*, 235 So. 3d 312 (Fla. 2018).

**Effective October 1, 2022, the Legislature changed “vagina” to “female genitals” in sex crimes-related statutes. Judges should ensure the jury instructions contain correct statutory terms, which will depend on the date alleged in the charging document. *Flores v. State*, -- So. 3d -- (Fla. 4th DCA 2024) is an example of an appellate court finding fundamental error when the trial judge expanded the definition of “vaginal penetration” by instructing on “female genital penetration.”

This instruction was adopted in 2014 [146 So. 3d 1110] and amended in 2018 [257 So. 3d 370], and December 21, 2022.