

11.27 SEXUAL MISCONDUCT BY A[N] [INSERT APPROPRIATE POSITION OF THE DEFENDANT] UPON AN [INMATE] [OFFENDER]

§ 944.35(3)(b)2., Fla. Stat.*

To prove the crime of Sexual Misconduct by a[n] (insert appropriate position of the defendant) upon an [Inmate] [Offender], the State must prove the following three elements beyond a reasonable doubt:

1. (Defendant) **engaged in sexual misconduct with** (victim).
2. **At the time,** (defendant) **was a[n]** (insert appropriate position of the defendant).
3. **At the time,** (victim) **was an [inmate] [offender supervised in the community by the Florida Department of Corrections].**

§ 944.35, Fla. Stat.

“Sexual misconduct” means the oral, anal, or female genital* penetration by, or union with, the sexual organ of another or the anal or female genital penetration of another by any other object. “Female genitals” includes the labia minora, labia majora, clitoris, vulva, hymen, and vagina.

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

“An object” includes a finger.

Phillips v. State, 238 So. 3d 308 (Fla. 4th DCA 2018).

“Union” means contact.

§ 944.35, Fla. Stat.

The consent of the [inmate] [offender] to any act of sexual misconduct is not a defense.

Give the following instructions only if applicable.

“Sexual misconduct” does not include an act done for a bona fide medical purpose. “Bona fide” means genuine.

“Sexual misconduct” does not include an act done for an internal search conducted in the lawful performance of the employee’s duty.

§ 944.710, Fla. Stat.

“Volunteer” means a person registered with the Florida Department of Corrections or a contractor-operated correctional facility who is engaged in specific voluntary service activities on an ongoing or continual basis.

§ 944.710, Fla. Stat.

“Contractor-operated correctional facility” means any facility, that is not operated by the Florida Department of Corrections, for the incarceration of

adults or juveniles who have been sentenced by a court and committed to the custody of the Department of Corrections.

§ 944.35, Fla. Stat.

The provisions of this statute do not apply to a[n] (insert appropriate position of the defendant) who engages in sexual misconduct and is legally married to an [inmate] [offender under the [Department’s] [facility’s] supervision], or to any (insert appropriate position of the defendant) who has no knowledge, and would have no reason to believe, that the person with whom the employee has engaged in sexual misconduct is an [inmate] [offender] under the [Department’s] [facility’s] supervision.

Lesser Included Offenses

SEXUAL MISCONDUCT BY A[N] [INSERT APPROPRIATE POSTION OF THE DEFENDANT] — 944.35(3)(b)2.			
CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
None			
	Battery	784.03	8.3
	Attempt	777.04(1)	5.1

Comments

*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.”

As of August 2024, it was unclear whether acts done for bona fide medical purposes, internal searches conducted in the lawful performance an employee’s duty, or the provisions in § 944.35(3)(b)4., Fla. Stat., should be treated as affirmative defenses or as elements that the State must disprove. If treated as an affirmative defense, the judge must then determine who has the burden of persuasion and what that burden is (preponderance of the evidence, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted on April 25, 2023, and amended on March 8, 2024, and on September 20, 2024.