

**11.5 SOLICITATION OF A CHILD TO ENGAGE IN AN ACT THAT
CONSTITUTES SEXUAL BATTERY BY A PERSON IN FAMILIAL OR
CUSTODIAL AUTHORITY****

§ 794.011(8)(a), Fla. Stat.

To prove the crime of Solicitation of a Child to Engage in an Act that Constitutes Sexual Battery by a Person in Familial or Custodial Authority, the State must prove the following three elements beyond a reasonable doubt:

- 1. (Defendant) solicited (victim) to engage in a Sexual Battery.**
- 2. At the time, (victim) was less than 18 years of age.**
- 3. At the time, (defendant) was in a position of familial or custodial authority to (victim).**

“Sexual Battery” means:

a. the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [female genitals] [mouth] of the [(victim)] [(defendant)];**

or

b. the [anus] [female genitals] of [(victim)] [(defendant)] [was] [were] penetrated by an object.**

Give if applicable. § 794.011(1), Fla. Stat.

However, any act done for bona fide medical purposes is not a Sexual Battery.

§ 794.021, Fla. Stat.

Ignorance of (victim’s) age, (victim’s) misrepresentation of his or her age, or the defendant’s bona fide belief of (victim’s) age is not a defense to the crime charged.

Give if applicable.

“Bona fide” means genuine.

It is not necessary that a Sexual Battery actually take place for the crime of Solicitation to be completed.

§ 794.011(8), Fla. Stat.

It is not a defense that (victim) was willing or consented to engage in an act that constitutes Sexual Battery.

Give if requested. § 794.022, Fla. Stat.

(Victim’s) lack of chastity is not a defense to the crime charged.

§ 777.04(2), Fla. Stat.

To “solicit” means to command, encourage, hire, or request another person to engage in specific conduct.

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.

Give if applicable. § 794.011(1)(b), Fla. Stat.

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

§ 775.0862, Fla. Stat.

Enhancement for sexual offense against student by school authority figure.

If you find that (defendant) committed the crime of Solicitation of a Child to Engage in an Act that Constitutes Sexual Battery by a Person in Familial or Custodial Authority, you must also determine whether the State has proved beyond a reasonable doubt that (defendant) was an authority figure at a school and (victim) was a student at the same school.

“Authority figure” means a person 18 years of age or older who is employed by, volunteering at, or under contract with a school.

“School” means an organization of students for instructional purposes on an elementary, middle or junior high school, secondary or high school, [or other public school level authorized under the rules of the State Board of Education]. The term “school” does not include facilities dedicated exclusively to the education of adults. If needed, insert appropriate definitions from § 775.0862(1)(b), Fla. Stat., for “private school” or “voluntary prekindergarten education program” or “early learning program” or “public school as described in § 402.3025(1)” or “the Florida School for the Deaf and the Blind” or the “Florida Virtual School” or the “K-8 Virtual School.”

“Student” means a person younger than 18 years of age who is enrolled at a school.

Lesser Included Offense

SOLICITATION OF A CHILD TO ENGAGE IN AN ACT THAT CONSTITUTES SEXUAL BATTERY BY PERSON IN FAMILIAL OR CUSTODIAL AUTHORITY — 794.011(8)(a)

CATEGORY ONE	CATEGORY TWO	FLA. STAT.	INS. NO.
Lewd or lascivious battery*		800.04(4)(a)2.*	11.10(b)*
	Written Solicitation of Certain Minors to Commit a Lewd or Lascivious Act	794.053	11.7(b)

Comments

*When instructing on the lesser-included offense of Lewd or Lascivious Battery, the judge should not instruct on the option of forcing a person to engage in any sexual act nor should the judge instruct about the acts of sadomasochistic abuse, sexual bestiality, or prostitution unless charged. More specifically, if the state's charging document tracks § 794.011(8)(a), Fla. Stat., the only part of Lewd or Lascivious Battery that is a necessary lesser-included offense is "encouraging or enticing a person less than 16 years old to engage in sexual activity."

**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."

See Instruction 11.16 or 11.16(a) if the State charged that the defendant qualified as a Dangerous Sexual Felony Offender, pursuant to § 794.0115, Fla. Stat.

The 2014 legislature added a sentencing multiplier to § 921.0024(1)(b), Fla. Stat., for sexual battery crimes involving a defendant 18 years of age or older and a victim younger than 18 years of age. If the State charges and intends to use this sentencing multiplier, a special instruction will be necessary for the jury to make an additional finding regarding the defendant's age.

As of February 2024, it was unclear whether acts done for bona fide medical purposes should be treated as an affirmative defense or as an element 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, clear and convincing, or beyond a reasonable doubt).

This instruction was adopted in 1987 [508 So. 2d 1221] and was amended in 1995 [657 So. 2d 1152], 1997 [697 So. 2d 84], 2015 [156 So. 3d 1037], 2016 [190 So. 3d 1055], on December 21, 2022, and on March 8, 2024.