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IN THE STATE OF SOUTH CAROLINA  
In the Supreme Court

**Jan 09 2023**

S.C. SUPREME COURT

**Certified Question from  
The United States Court of Appeals for the Fourth Circuit**

Appellate Case No. 2022-001378

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UNITED STATES OF AMERICA,

Plaintiff/Appellee,

vs.

PATRICK FITZGERALD CLEMONS,

Appellant/Defendant.

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**OPENING BRIEF**

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**TABLE OF CONTENTS**

STATEMENT OF ISSUES FOR REVIEW ..... 1

STATEMENT OF THE CASE ..... 1

STANDARD OF REVIEW ..... 3

ARGUMENT ..... 6

    1. Introduction ..... 6

    2. What mental state is required to commit South Carolina Assault and  
    Battery, Second Degree, in violation of S.C. Code Ann. § 16-3-600? ..... 11

    3. What mental state is required to commit South Carolina Criminal  
    Domestic Violence of a High and Aggravated Nature, in violation of S.C.  
    Code Ann. § 16-25-65? ..... 17

CONCLUSION ..... 6

## TABLE OF AUTHORITIES

### Cases

<i>Arthurs v. Aiken County</i> , 338 S.C. 253, 266, 525 S.E.2d 542, 549 (Ct. App. 1999) .....	20
<i>Books-A-Million, Inc. v. S.C. Dep’t of Revenue</i> , ___ S.C. ___, 880 S.E.2d 476, 477 (2022).....	3
<i>Borden v. United States</i> , 141 S. Ct. 1817, 1825 (2021) .....	2
<i>Bryant v. Commonwealth</i> , 295 Va. 302, 310, 811 S.E.2d 250, 253 (Va. 2018).....	13
<i>Carter v. United States</i> , 530 U.S. 255, 269 (2000)	14
<i>Duvall v. South Carolina Budget and Control Bd.</i> , 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) .....	23
<i>Gov’t Emp. Ins. Co. v. Poole</i> , 424 S.C. 1, *6, 817 S.E.2d 283, 286 (2018).....	14
<i>Hair v. State</i> , 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991) .....	4
<i>Kerr v. State</i> , 345 S.C. 183, 189, 547 S.E.2d 494, 497 (2001) .....	4
<i>McKnight v. State</i> , 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008).....	24
<i>Sloan v. Hardee</i> , 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2000).....	4
<i>State v. American Agric. Chem. Co.</i> , 118 S.C. 333, 337, 110 S.E. 800, 802 (1922)7-8, 21.	
<i>State v. Bailey</i> , 416 S.C. 344, 349, 785 S.E.2d 622, 625 (Ct. App. 2016) .....	6,10
<i>State v. Beck</i> , 1 Hill (S.C.) 363, 363 (Ct. App. 1833).....	9

*State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991).....4

*State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997).....10,16

*State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019) .....7

*State v. Cutler*, 274 S.C. 376, 264 S.E.2d 420 (1980).....4

*State v. Dingle*, 376 S.C. 643, 649–50, 659 S.E.2d 101, 105 (2008) .....4

*State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000) .....6,9,22

*State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990).....7, 8,  
14, 15, 21

*State v. Foust*, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1992) .....9

*State v. Golston*, 399 S.C. 393, 397, 732 S.E.2d 175, 178 (Ct. App. 2012) .....18

*State v. Gordon*, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003).....4

*State v. Jefferies*, 316 S.C. 13, 20, 446 S.E.2d 427, 431 (1994).....6,19

*State v. Jenkins*, 278 S.C. 219, 222, 294 S.E.2d 44, 45 (1982) .....15,20

*State v. Kinard*, 373 S.C. 500, 503-04, 646 S.E.2d 168, 169 (Ct. App. 2007) ....7

*State v. King*, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017) .....7

*State v. LaCoste*, 347 S.C. 153, 166, 553 S.E.2d 464, 471 (Ct. App. 2001) .....19

*State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004) .....3

*State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) .....11

*State v. Mims*, 286 S.C. 553, 335 S.E.2d 237 (1985) .....8

*State v. Morris*, 376 S.C. 189, 201, 656 S.E.2d 359, 366 (2008) .....8

*State v. Robinson*, 437 S.C. 226, 231, 878 S.E.2d 8, 11 (Ct. App. 2022), *petition for cert. filed* (Oct. 20, 2022) .....4, 16

*State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997).....8

*State v. Sterling*, 396 S.C. 599, 616, 723 S.E.2d 176, 185 (2012) .....8,14, 16

*State v. Sussewell*, 149 S.C. 128, 146 S.E. 697, 703 (1929) .....9

*State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000) .....7,8

*State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000).....24

*Thomerson v. DeVito*, 430 S.C. 246, 249, 844 S.E.2d 378, 380 (2020) .....5

*United States v. Bailey*, 444 U.S. 394, 403 (1980) .....6

*Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966).....11

*White v. State*, 375 S.C. 1, 7, 649 S.E.2d 172, 175 (Ct. App. 2007).....3

**Statutes**

S.C. Code Ann. §16-3-600 .....*passim*

S.C. Code Ann. §16-25-20 .....*passim*

S.C. Code Ann. §16-25-65.....*passim*

S.C. Code Ann. §44-53-370(a) .....15, 21

18 U.S.C. §922(g)(1) .....1  
18 U.S.C §924(a)(2).....1  
18 U.S.C. §924(e) .....1

## **STATEMENT OF ISSUES FOR REVIEW**

On October 3, 2022, the United States Court of Appeals for the Fourth Circuit certified two questions of law to this Court. *See* Order, *United States v. Clemons*, No. 22-4152 (4th Cir. Oct. 3, 2022), ECF No. 33-2. On October 26, 2022, this Court, pursuant to Rule 244, SCACR, accepted certification of the following questions:

1. What mental state is required to commit South Carolina Assault and Battery, Second Degree, in violation of S.C. Code [Ann.] § 16-3-600?
2. What mental state is required to commit South Carolina Criminal Domestic Violence of a High and Aggravated Nature, in violation of S.C. Code [Ann.] § 16-25-65?

## **STATEMENT OF THE CASE**

In August 2021, a federal grand jury charged Patrick Fitzgerald Clemons (Clemons) in a six-count superseding indictment. Later that month, Clemons pleaded guilty without a written plea agreement to being a felon in possession of a firearm, a violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e).

A presentencing report determined that Clemons qualified for an enhanced statutory sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e) (2020), based on three prior South Carolina convictions: two for violations of S. C. Code Ann. § 16-25-65 (Supp. 2006), Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN), and one for a violation of S.C. Code Ann. § 16-3-

600(D)(1) (2015), Assault and Battery, Second Degree (AB2d). Clemons objected, arguing none of these convictions qualified as predicate offenses based on the United States Supreme Court’s recent decision in *Borden v. United States*, 141 S. Ct. 1817, 1825 (2021). In *Borden*, the Supreme Court held that the ACCA’s force clause does not “include[] offenses criminalizing reckless conduct.” 141 S. Ct. at 1825 (plurality opinion); *id.* at 1834 (Thomas, J., concurring in the judgment). The Court found that ACCA’s use of the phrase “against another” “demands that the perpetrator direct his action at, or target, another individual,” and “[r]eckless conduct is not aimed in that prescribed manner.” *Id.* at 1825 (plurality opinion). Crimes covered by ACCA’s force clause “are best understood to involve not only a substantial degree of force, but also a *purposeful or knowing* mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk.” *Borden*, 141 S. Ct. at 1830 (plurality opinion) (emphasis added); *id.* at 1834 (Thomas, J., concurring in judgment). The Court believed that offenses covered by a recklessness *mens rea* would end up improperly “impos[ing] large sentencing enhancements on individuals (for example, reckless drivers) far afield from the ‘armed career criminals’ ACCA addresses.” *Id.* at 1825 (plurality opinion).

At sentencing, the district court overruled Clemons’ objection. The district court ultimately sentenced Clemons to 145 months’ imprisonment.

Clemons filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit. In his opening brief before the Fourth Circuit, Clemons argued that none of these South Carolina convictions qualify as ACCA predicate offenses as they can be committed via a reckless *mens rea*.

The Fourth Circuit's certification order followed.

### **STANDARD OF REVIEW**

This Court reviews questions of statutory interpretation de novo. *Books-A-Million, Inc. v. S.C. Dep't of Revenue*, \_\_\_ S.C. \_\_\_, 880 S.E.2d 476, 477 (2022). “The cardinal rule of statutory construction is to ascertain and effectuate the legislative intent whenever possible.” *State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 505 (Ct. App. 2004). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” *Id.* Appellate courts do not construe particular clauses of a statute in isolation but read them “in conjunction with the purpose of the whole statute and the policy of the law.” *White v. State*, 375 S.C. 1, 7, 649 S.E.2d 172, 175 (Ct. App. 2007).

“The legislature's intent should be ascertained primarily from the plain language of the statute.” *Landis*, 362 S.C. at 102, 606 S.E.2d at 505. “Words must

be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation. When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *Id.* (citation omitted).

When a statutory term is not defined, "[w]ords must be given their plain and ordinary meaning without resorting to subtle or forced construction which limits or expands the statute's operation." *Sloan v. Hardee*, 371 S.C. 495, 499, 640 S.E.2d 457, 459 (2000). "When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning." *State v. Robinson*, 437 S.C. 226, 231, 878 S.E.2d 8, 11 (Ct. App. 2022), *petition for cert. filed* (Oct. 20, 2022).

"[W]hen a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant." *State v. Blackmon*, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citing *State v. Cutler*, 274 S.C. 376, 264 S.E.2d 420 (1980)); *see also State v. Dingle*, 376 S.C. 643, 649–50, 659 S.E.2d 101, 105 (2008); *State v. Gordon*, 356 S.C. 143, 153, 588 S.E.2d 105, 110 (2003); *Kerr v. State*, 345 S.C. 183, 189, 547 S.E.2d 494, 497 (2001); *Hair v. State*, 305 S.C. 77, 79, 406 S.E.2d 332, 334 (1991).

The standard of review when answering a certified question depends on the context of the case. Typically, when a novel issue of law is raised, this Court is "free to decide the question based on its assessment of which answer and reasoning would

best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Thomerson v. DeVito*, 430 S.C. 246, 249, 844 S.E.2d 378, 380 (2020).

## ARGUMENT

### 1. Introduction

The matter before this Court is a determination of the *mens rea* associated with violations of § 16-3-600(D)(1) (AB2d) and § 16-25-65 (CDVHAN). It is therefore useful to review several general principles regarding the concept of *mens rea* related to South Carolina criminal offenses.

A voluntary act, without more, is usually not enough to incur criminal liability, unless the offense is one of strict liability. *State v. Jeffries*, 316 S.C. 13, 20, 446 S.E.2d 427, 431 (1994) (“The modern definition of ‘positive act’ does not encompass the state of mind required for criminal liability.”). Simply put, “[a] defendant may not be convicted of a criminal offense unless the State proves beyond a reasonable doubt that he acted with the criminal intent, or mental state, required for a particular offense.” *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). This Court determines the *mens rea* for a criminal offense by “look[ing] to common law and the development of the statute [by the General Assembly] to determine whether the legislature intended the crime to require a *mens rea*” and, if so, what degree of *mens rea* is required. *Jeffries*, 316 S.C. at 18, 446 S.E.2d at 430.

“At common law, crimes generally were classified as requiring either ‘general intent’ or ‘specific intent.’” *United States v. Bailey*, 444 U.S. 394, 403 (1980). South

Carolina continues to follow the common law’s distinction between specific intent and general intent crimes, even for codified offenses. *See, e.g., State v. King*, 422 S.C. 47, 55, 810 S.E.2d 18, 22 (2017) (“We agree with the Court of Appeals that the legislature intended to require the State to prove specific intent to commit murder as an element of attempted murder, and therefore the trial court erred by charging the jury that attempted murder is a general intent crime.”) (internal quotation marks and citation omitted).

Specific intent, particularly as to attempt crimes, “means that the defendant consciously intended the completion of acts comprising the choate offense. In other words, the completion of such acts is the defendant’s purpose.” *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000). By contrast, “general intent” is defined as “the state of mind required for the commission of certain common law crimes not requiring specific intent” and it “usually takes the form of recklessness . . . or negligence.” *State v. Kinard*, 373 S.C. 500, 503-04, 646 S.E.2d 168, 169 (Ct. App. 2007) (citations omitted) (quoting Black’s Law Dictionary 813, 969 (7th ed. 1999)), *overruled on other grounds by State v. Burdette*, 427 S.C. 490, 832 S.E.2d 575 (2019).

Criminal negligence is defined as “such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.” *State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990) (quoting *State v. American*

*Agric. Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800, 802 (1922)). Criminal recklessness is defined as “an indifference to the consequences of one’s acts. It denotes a conscious failure to exercise due care or ordinary care or a conscious indifference to the rights and safety of others or a reckless disregard thereof.” *State v. Rowell*, 326 S.C. 313, 315, 487 S.E.2d 185, 186 (1997).

“Where a statute does not specify that criminal liability is to be imposed based upon graduated levels of intent, [this Court is] extremely reluctant to draw such distinctions.” *State v. Morris*, 376 S.C. 189, 201, 656 S.E.2d 359, 366 (2008). *See also State v. Sterling*, 396 S.C. 599, 616, 723 S.E.2d 176, 185 (2012) (in the face of statutory silence, this Court does not “weaken the legislators’ decision to criminalize [certain actions] by imposing a high standard of intent.”). Instead, the criminal act “must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.” *Ferguson*, 302 S.C. at 272, 395 S.E.2d at 183.

At common law, assault was a specific attempt crime because it was “defined as an ‘attempted battery’ or an unlawful attempt or offer to commit a violent injury upon another person, coupled with the present ability to complete the attempt or offer by a battery.” *Sutton*, 340 S.C. at 397, 532 S.E.2d at 285 (citing *State v. Mims*, 286 S.C. 553, 335 S.E.2d 237 (1985)). The completed offense of battery, by contrast,

was a general intent crime capable of commission by reckless or criminally negligent conduct. *See, e.g., State v. Beck*, 1 Hill (S.C.) 363, 363 (Ct. App. 1833) (battery can be accomplished by negligent act “as, where a person throwing stones into the highway, strikes another passing; or, as in the instance of a person throwing a lighted squib into a crowd.”); *see also* 2 Wharton’s Criminal Law § 23:2 (16th ed.) (2022) (“[A] criminal battery is committed, in accordance with the prevailing view, if ... the contact was the result of recklessness or criminal negligence.”); 6 Am. Jur. 2d Assault and Battery § 16 (2022) (“A criminal assault or battery may be committed by a wanton or reckless act.”); 6A C.J.S. Assault § 86 (“Wanton and reckless conduct may substitute for the intentional conduct element necessary for a battery.”).

Prior to the codification of assault and battery offenses, South Carolina “recognize[d] three levels of assault: the offense of simple assault and battery, the offense of assault and battery of a high and aggravated nature (ABHAN), and the offense of [assault and battery with intent to kill].” *Fennell*, 340 S.C. at 274, 531 S.E.2d at 516 (footnote omitted). These completed offenses were general intent offenses. *See State v. Foust*, 325 S.C. 12, 15, 479 S.E.2d 50, 51 (1992) (concluding that assault and battery with intent to kill required the general intent to kill, not the specific intent to kill); *State v. Sussewell*, 149 S.C. 128, 146 S.E. 697, 703 (1929)

(upholding conviction for common law ABHAN because defendant’s actions showed “gross negligence and recklessness”).

Like other jurisdictions, it is presumed the General Assembly is “aware of the common law [when it legislates], and where a statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” *State v. Bridgers*, 329 S.C. 11, 14, 495 S.E.2d 196, 198 (1997); *see also State v. Bailey*, 416 S.C. 344, 349, 785 S.E.2d 622, 625 (Ct. App. 2016) (same). Indeed, the General Assembly incorporated the principles of specific intent and general intent *mens rea* into both the assault and battery and domestic violence statutes. The assault and battery statute, for example, states that an individual commits AB2d if the person “unlawfully injures another person” — *i.e.*, commits a battery—“or offers or attempts to injure another person with the present ability to do so” — *i.e.*, commits an assault. S.C. Code Ann. § 16-3-600(D)(1) (2015). Domestic violence occurs when an individual “cause[s] physical harm or injury to a person’s own household member” — *i.e.*, commits a battery— or “offer[s] or attempt[s] to cause physical harm or injury to a person’s own household member with apparent present ability under circumstances reasonably creating fear of imminent peril” — *i.e.*, commits an assault. S.C. Code Ann. § 16-25-20(A) (Supp. 2022).

With these animating principles in mind, each certified question is addressed separately below.

**2. What mental state is required to commit South Carolina Assault and Battery, Second Degree, in violation of S.C. Code Ann. § 16-3-600?**

An analysis of § 16-3-600, considered in conjunction with the existing case law of this state, establishes the battery portion of AB2d can be violated with a *mens rea* of either criminal negligence or recklessness. This Court should so find.

Neither the statute itself nor its legislative history discloses a purpose of the 2010 codification of assault and battery offenses other than to abolish certain common law and statutory offenses and create new statutory offenses. *See State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) (the General Assembly “abolished all common law assault and battery offenses and all prior statutory assault and battery offenses.”). The statutory scheme is titled “§ 16-3-600. Assault and battery; definitions; degrees of offense.” S.C. Code Ann. § 16-3-600 (2015). *See Univ. of S.C. v. Elliott*, 248 S.C. 218, 221, 149 S.E.2d 433, 434 (1966) (“[I]t is proper to consider the title or caption of an act in aid of construction to show the intent of the legislature.”). *See also* Omnibus Crime Reduction and Sentencing Reform Act of 2010, Act No. 273, 2010 S.C. Acts 1937, Part I, § 7(B) (“The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and

aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effective date of this act.”). The subject matter and general purpose of this statute, therefore, is simply to “abolish” certain offenses and criminalize certain conduct involving specific intent offenses (assault) and general intent crimes (battery) not covered by other sections of Title 16 of the South Carolina Code.

As is relevant here, § 16-3-600(D) creates the AB2d offense with the following circumstances:

[a] person commits the offense of assault and battery in the second degree if the person unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so, and:

(a) moderate bodily injury to another person results or moderate bodily injury to another person could have resulted; or

(b) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing.

S.C. Code Ann. § 16-3-600(D)(1) (2015).<sup>1</sup> This offense is a lesser-included offense of several greater offenses. *See, e.g.*, S.C. Code Ann. § 16-3-600(D)(3) (2015) (“Assault and battery in the second degree is a lesser-included offense of assault and battery in the first degree, as defined in (C)(1), assault and battery of a high and

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<sup>1</sup> “Moderate bodily injury” and “private parts” are defined statutory terms. S.C. Code Ann. § 16-3-600(A)(2), (A)(3) (2015).

aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29.”).

It is evident that § 16-3-600(D)(1) creates one offense with two methods of committing that offense: either by an assault (a person “offers or attempts to injure”) or via a battery (a person “unlawfully injures another person”). While the first method’s *mens rea* is clear—attempt is a specific intent crime—the General Assembly did not provide a *mens rea* for the second method, the battery.

To commit the battery offense, all that is required is for a defendant to act “unlawfully.” To the extent this term can be read to denote a *mens rea*, the term is not defined. As noted above, “[w]hen faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.” *Robinson*, 437 S.C.at 231, 878 S.E.2d at 11. Indeed, “[t]he ordinary-meaning rule is the most fundamental semantic rule of [statutory] interpretation.” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012).

“Unlawful” simply means “[n]ot authorized by law; illegal” or “criminally punishable.” Black’s Law Dictionary 1536 (7th ed. 1999). *See also Bryant v. Commonwealth*, 295 Va. 302, 310, 811 S.E.2d 250, 253 (Va. 2018) (“‘Unlawfully,’ [] describes conduct that merely demonstrates criminal negligence.”) (cleaned up). If “unlawfully” is the term meant by the General Assembly to denote the *mens rea*

associated with the battery offense contained in AB2d, then it is evident AB2d can be violated by negligent conduct.

Assuming “unlawfully” is not the General Assembly’s expression of the *mens rea* applicable to AB2d’s battery offense, the statute is therefore silent as to the *mens rea* necessary for conviction. Under this Court’s precedent,

[i]n offenses at common law, and under statutes which do not disclose a contrary legislative purpose, to constitute a crime, the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent to a criminal intent.

*Ferguson*, 302 S.C. at 272, 395 S.E.2d at 183 (citation omitted). This Court does not “weaken the legislators’ decision to criminalize [certain actions] by imposing a high standard of intent.” *Sterling*, 396 S.C. at 616, 723 S.E.2d at 185. Instead, courts “read into a statute *only* that *mens rea* which is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter v. United States*, 530 U.S. 255, 269 (2000) (citation omitted) (emphasis added). If the General Assembly intended the battery offense contained in AB2d to require a *mens rea* greater than negligence or recklessness, it “could have [indicated] so with clear, express language.” *Gov’t Emp. Ins. Co. v. Poole*, 424 S.C. 1, \*6, 817 S.E.2d 283, 286 (2018). It did not do so.

In instances where a criminal statute is silent as to its *mens rea*, this Court is loathe to read into the statute a *mens rea* not evidenced from the statute’s purpose

and design. For example, in *Ferguson*, this Court reviewed S.C. Code Ann. § 44-53-370(a) (1985) which criminalized drug offenses. This statute provided, in pertinent part “[I]t shall be *unlawful* for any person: (a) to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance.” S.C. Code Ann. § 44-53-370(a) (1985) (emphasis added). While § 44-53-370 criminalizes a variety of behavior associated with illegal drugs, this Court determined the statute demanded a *mens rea* beyond strict liability.<sup>2</sup> But even then, this Court was unwilling impose a *mens rea* beyond that which differentiated criminal from legal behavior. This Court held that “the State must show that a given defendant was at least criminally negligent when he/she manufactured, distributed, or dispensed a controlled substance in order to prove a violation of § 44-53-370(a).” *Ferguson*, 302 S.C. at 273, 395 S.E.2d at 184.

As to the battery offense contained in AB2d, there simply is no reason to suspect the General Assembly meant to require a *mens rea* greater than criminal negligence or recklessness, as those mental states were associated with common law

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<sup>2</sup> This Court has determined that some offenses do not require any *mens rea* at all, as the General Assembly may pass legislation “in aid of the police power of the state.” *State v. Jenkins*, 278 S.C. 219, 222, 294 S.E.2d 44, 45 (1982) (citation omitted). *See also id.* (General Assembly “may forbid the doing of an act and make its commission criminal without regard to the intent or knowledge of the doer”) (citation omitted).

battery offenses. Even though the General Assembly abolished common law assault and battery crimes when it created the new statutory scheme in 2010, it did so “aware of the common law, and where [the] statute uses a term that has a well-recognized meaning in the law, the presumption is that the General Assembly intended to use the term in that sense.” *Bridgers*, 329 S.C. at 14, 495 S.E.2d at 198. *See also Robinson*, 437 S.C. at 233, 878 S.E.2d at 11 (review of offense located at S.C. Code Ann. § 16-3-600(C)(1) (2015) informed by “the traditional understanding of assault and battery as delineated by our courts for over a century.”).

It is unlikely the General Assembly intended knowing or purposeful conduct to be required for the battery in AB2d when the statute is silent as to *mens rea*. Importantly, in the face of statutory silence, this Court does not “weaken the legislators’ decision to criminalize [certain actions] by imposing a high standard of intent.” *Sterling*, 396 S.C. at 616, 723 S.E.2d at 185. According to the authority cited above and the history of battery offenses in this State, this Court should interpret the general intent battery offense contained in AB2d to require only that *mens rea* necessary to differentiate lawful from illegal conduct. That *mens rea* is either criminal negligence or recklessness.

**3. What mental state is required to commit South Carolina Criminal Domestic Violence of a High and Aggravated Nature, in violation of S.C. Code Ann. § 16-25-65?**

CDVHAN has a lengthy history. When first enacted in 1994, CDVHAN occurred when a defendant “violates the provisions of [S.C. Code Ann.] § 16-25-20 and the elements of [common law] assault and battery of a high and aggravated nature are present.” S.C. Code Ann. § 16-25-65(A) (Supp. 1995). The statute was amended in 2003 to require that the defendant commit domestic violence and either “intentionally commit[] an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim;” or “intentionally commit[] an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.” S.C. Code Ann. § 16-25-65(A) (Supp. 2004). In 2005, the statute was amended again, this time to remove the requirement that the assault and/or battery be committed intentionally. S.C. Code Ann. § 16-25-65(A) (Supp. 2006). Finally, in 2015, the version in effect today, the Legislature amended § 16-25-65(A) to require that the State prove that the defendant committed domestic violence and either:

1. The defendant committed “the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;”

2. The defendant committed “the offense, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death; or”

3. The defendant violated “a protection order and, in the process of violating the order, commit[ted] domestic violence in the first degree.”

S.C. Code Ann. § 16-25-65(A) (Supp. 2022). The statute further provides a non-exhaustive list of “[c]ircumstances manifesting extreme indifference to the value of human life,” including “committing the offense against a person he ... should have known[] to be pregnant.” S.C. Code Ann. § 16-25-65(D)(4) (Supp. 2022).

While the statutory language has changed over the years, the basic structure of the CDVHAN statute remains the same. An offender commits CDVHAN by violating § 16-25-20(A) when statutory circumstances of aggravation are present. *See State v. Golston*, 399 S.C. 393, 397, 732 S.E.2d 175, 178 (Ct. App. 2012) (“A person is guilty of CDVHAN when, in addition to proving CDV, the State proves one of the aggravating circumstances set forth in subsection 16-25-65(A).”). Therefore, any analysis of CDVHAN’s *mens rea* turns on the *mens rea* required to commit the underlying crime of domestic violence.

Section 16-25-20(A) is divided into two offenses: a battery offense and an assault offense. *See generally State v. LaCoste*, 347 S.C. 153, 166, 553 S.E.2d 464, 471 (Ct. App. 2001) (“Assault and subsection (2) of the CDV statute appear very similar.”). Section 16-25-20(A)(1)—the battery offense—states “[i]t is unlawful to cause physical harm or injury to a person’s own household member.” Section 16-25-20(A)(2)—the assault offense—states “[i]t is unlawful to offer or attempt to cause physical harm or injury to a person’s own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.”

The *mens rea* of the assault offense is easily established: it requires the specific intent to cause physical harm or injury because it is an attempt crime. The General Assembly, however, did not provide for a *mens rea* for the battery offense. *See, e.g., Jeffries*, 316 S.C. at 18, 446 S.E.2d at 430 (concluding that the similarly-worded kidnapping statute “does not expressly state whether a *mens rea* is required”). Therefore, “common law and the development of the statute” determine what level of *mens rea* to attribute to § 16-25-20(A)(1). *Id.* These sources readily supply the answer: the general intent attributable to a battery offense.

The General Assembly enacted § 16-25-20(A) against the well-developed background of assault and battery common law and chose to employ terms closely associated with assault and battery offenses, such as “injury” and “present ability.”

*See Sutton*, 340 S.C. at 397, 532 S.E.2d at 285 (assault is defined as an “‘attempted battery’ or an unlawful attempt or offer to commit a violent *injury* upon another person, coupled with the *present ability* to complete the attempt or offer by a battery”) (emphases added). The General Assembly further divided § 16-25-20(A) into two means of committing domestic violence, each corresponding with either assault or battery. It would make little sense for the General Assembly to engraft a greater *mens rea* than that associated with common law battery for an offense which is essentially battery of a household member.

Moreover, “[t]he essential purpose of the statute is to protect against harm and violence from members of an individual’s household.” *Arthurs v. Aiken County*, 338 S.C. 253, 266, 525 S.E.2d 542, 549 (Ct. App. 1999). For this reason, the statute’s focus is not on the intent of the offender, but on the “caus[ing] physical harm or injury” to the victim. By criminalizing the result—not the act—the General Assembly clearly intended for lesser degrees of general intent *mens rea* to satisfy the battery offense. *Cf. State v. Jenkins*, 278 S.C. 219, 222, 294 S.E.2d 44, 45-46 (1982) (concluding that strict liability was appropriate for unlawful neglect of a child because the statute “was enacted to provide protection for those persons whose tender years or helplessness renders them incapable of self-protection”). After all, one can recklessly or negligently “cause physical harm or injury” to a victim.

This conclusion comports with this Court’s precedents on determining *mens rea* when the General Assembly does not expressly include *mens rea* in an offense. In 1922, this Court held that the general rule for “statutes which do not disclose a contrary legislative purpose” was that “the act must be accompanied by a criminal intent, or by such negligence or indifference to duty or to consequences as is regarded by the law as equivalent intent.” *State v. American Agric. Chem. Co.*, 118 S.C. 118 S.C. 333, 337, 110 S.E. 800, 802 (1922). This Court applied *American Agricultural Chem. Co.* in *Ferguson* in reviewing S.C. Code Ann. § 44-53-370(a)(1) which, among other things, makes it “unlawful for any person ... to ... distribute ... a controlled substance.” Relying on *American Agricultural Chem. Co.*, this Court concluded that the offense required that “a given defendant was at least criminally negligent when he/she manufactured, distributed, or dispensed a controlled substance in order to prove a violation of § 44-53-370(a).” *Ferguson*, 302 S.C. at 273, 395 S.E.2d at 184.

The same result holds here. The “legislative purpose” behind § 16-25-20(A)(1) is to punish an individual who “cause[s] physical harm or injury.” *American Agric. Chem. Co.*, 118 S.C. at 337, 110 S.E. at 802. Therefore, the offense requires that the State prove that “a given defendant was at least criminally negligent” when committing the battery. *Ferguson*, 302 S.C. at 273, 395 S.E.2d at 184. Consequently,

§ 16-25-20(A)(1) requires only that the offender act with the general intent historically attributable to battery offenses.

Except for a brief period from 2003 through 2005, the offense of CDVHAN has never required a greater *mens rea* than that necessary to establish a violation of § 16-25-20(A). As originally enacted, a defendant committed CDVHAN when the offender violated § 16-25-20(A) and “the elements of [common law] assault and battery of a high and aggravated nature are present.” S.C. Code Ann. § 16-25-65(A) (Supp. 1995). While this Court never “explicitly identified any particular mental state the State must prove in order for a defendant to be found guilty of ABHAN,” that mental state was a general intent lesser than malice because “[t]he State does not ... have to prove the defendant acted with malice to obtain an ABHAN conviction.” *Fennell*, 340 S.C. at 274-275, 531 S.E.2d at 517. In other words, ABHAN required general intent similar to battery, which, as has already been established, can take the form of recklessness or criminal negligence.

In 2003, the General Assembly added an intent requirement to CDVHAN. The General Assembly modified the battery offense of § 16-25-20(A)(1) to require proof that the defendant “intentionally commit[] an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim.” S.C. Code Ann. § 16-25-65(A)(1) (Supp. 2004). Alternatively, the General Assembly

further modified the assault offense of § 16-25-20(A)(2) to require proof that the defendant “intentionally commit[] an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.” S.C. Code Ann. § 16-25-65(A)(2) (Supp. 2004). Therefore, during the brief period of time in which this version of the statute was in effect, CDVHAN required that a defendant act “intentionally” when committing either the assault or battery found at § 16-25-20(A).

This requirement was short-lived. In 2005, the General Assembly amended § 16-25-65(A) and made a significant change: to remove the word “intentionally” from §§ 16-25-65(A)(1) and (2). S.C. Code Ann. § 16-25-65(A) (Supp. 2006). By deleting the heightened intent requirement enacted just two years before, the General Assembly demonstrated clear legislative intent to lessen the burden of proof regarding *mens rea* upon the State for CDVHAN offenses. *See Duvall v. South Carolina Budget and Control Bd.*, 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008) (“When the Legislature adopts an amendment to a statute, this Court recognizes a presumption that the Legislature intended to change the existing law.”). Instead of requiring that the State prove that a defendant “intentionally” committed an assault or battery, the 2005 amendment returned the CDVHAN offense to its traditional understanding: an assault or battery accompanied by circumstances of aggravation.

Since the circumstances of aggravation did not heighten the *mens rea* required for the assault or battery offenses, the *mens rea* for CDVHAN was once again that required by § 16-25-20(A).

The 2015 changes to § 16-25-65(A) did not alter that fundamental calculus. In 2015, the General Assembly removed the circumstances of aggravation initially added in 2003 and then revised in 2005 and instead added new circumstances of aggravation. Now, CDVHAN requires that the defendant commit domestic violence “under circumstances manifesting extreme indifference to the value of human life” or by “violat[ing] a protection order.” S.C. Code Ann. § 16-25-65(A) (Supp. 2022).

In 2008, this Court concluded that the phrase “extreme indifference to human life” is equivalent to reckless behavior in the context of the similarly-worded homicide by child abuse statute. *See McKnight v. State*, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (“[T]he references in the criminal intent charge to recklessness and indifference are consistent with this Court’s HCA jurisprudence regarding the meaning of ‘extreme indifference to human life.’”). Since “[t]he legislature is presumed to be aware of this Court’s interpretation of its statutes,” the General Assembly knew that the addition of the phrase “extreme indifference to the value of human life” would not require a *mens rea* greater than recklessness. *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 188, 525 S.E.2d 872, 879 (2000).

Moreover, given the General Assembly’s swift removal of the word “intentionally” from § 16-25-65(A) in 2005, it would be unlikely that the General Assembly intended to return to a heightened state of *mens rea* for CDVHAN offenses through its 2015 amendments to § 16-25-65(A). Consequently, the *mens rea* necessary to establish a violation of either §§ 16-25-65(A)(1) or (2) is that required by § 16-25-20(A).

The same conclusion holds true for the “protection order” circumstance of aggravation codified at § 16-25-65(A)(3). While the protection order provision also requires that the offender “commit[] domestic violence in the first degree,” the General Assembly created an easy path to satisfy that requirement in the domestic violence statute. S.C. Code Ann. § 16-25-65(A)(3) (Supp. 2022). A defendant commits domestic violence in the first degree by “violat[ing] a protection order and, in the process of violating the order, commits domestic violence in the second degree.” S.C. Code Ann. § 16-25-20(B)(2) (Supp. 2022). Similarly, a defendant commits domestic violence in the second degree by “violat[ing] a protection order and in the process of violating the order commits domestic violence in the third degree.” S.C. Code Ann. § 16-25-20(C)(2) (Supp. 2022). Finally, a defendant commits domestic violence in the third degree by violating § 16-25-20(A). S.C. Code Ann. § 16-25-20(D). Consequently, committing domestic violence while violating a protection order is simultaneously a violation of CDVHAN, domestic violence in the

first degree, domestic violence in the second degree, and domestic violence in the third degree. Since domestic violence in the third degree is a violation of § 16-25-20(A), the “protection order” circumstance of aggravation essentially prohibits a defendant from committing domestic violence while violating a protection order. In other words, the *mens rea* required to establish a violation of § 16-25-65(A)(3) is that required by § 16-25-20(A).

In summary, the *mens rea* for CDVHAN offenses is, and traditionally has been, the *mens rea* for domestic violence offenses now codified at § 16-25-20(A). This Court should conclude that the *mens rea* for the assault domestic violence offense is specific intent and that the *mens rea* for the battery domestic violence offense is the general intent of recklessness or criminal negligence.

### **CONCLUSION**

Respectfully, this Court should find the *mens rea* required for AB2d is either criminal negligence or recklessness, and the *mens rea* required for the assault domestic violence offense is specific intent and the battery domestic violence offense is the general intent of recklessness or criminal negligence.

Respectfully submitted,

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