

---

IN THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

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

---

Appellate Case No. 2022-001378

**RECEIVED**

**Feb 22 2023**

UNITED STATES OF AMERICA,

S.C. SUPREME COURT

Plaintiff/Appellee,

vs.

PATRICK FITZGERALD CLEMONS,

Appellant/Defendant.

---

**RESPONSE BRIEF**

---

ADAIR F. BOROUGHS  
UNITED STATES ATTORNEY

KATHLEEN M. STOUGHTON (#12161)  
ASSISTANT U.S. ATTORNEY  
1441 MAIN STREET, SUITE 500  
COLUMBIA, SOUTH CAROLINA 29201  
TEL.: (803) 929-3114  
FAX: (803) 929-3135  
Kathleen.Stoughton@usdoj.gov  
*ATTORNEY FOR PLAINTIFF/APPELLEE*

**TABLE OF CONTENTS**

	<b><u>PAGE</u></b>
TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES.....	1
I.    What mental state is required to commit South Carolina Assault and Battery Second Degree, in violation of S.C. Code Ann. § 16–3–600?	
II.   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?	
STANDARD OF REVIEW .....	3
ARGUMENT .....	3
I.    PRINCIPLES OF MENS REA IN SOUTH CAROLINA LAW.....	3
A.    Specific Intent vs. General Intent.....	4
B.    The Hierarchal Approach.....	5
C.    Mens Rea in Statutory Offenses.....	7
II.   SECOND DEGREE ASSAULT AND BATTERY CAN ONLY BE COMMITTED BY INTENTIONAL CONDUCT .....	11
III.  CRIMINAL DOMESTIC VIOLENCE OF A HIGH AND AGGRAVATED NATURE CAN ONLY BE COMMITTED BY INTENTIONAL CONDUCT .....	25
CONCLUSION.....	40

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Arthurs v. Aiken Cty.</i> , 338 S.C. 253, 525 S.E.2d 542 (Ct. App. 1999) .....	31
<i>Baddourah v. McMaster</i> , 433 S.C. 89, 856 S.E.2d 561 (2021) .....	31, 32, 33
<i>Borden v. United States</i> , 141 S.Ct. 1817 (2021) .....	1, 6, 7
<i>California v. Burton</i> , 243 Cal. App. 4th 129, 196 Cal. Rptr. 3d 392 (Ct. App. 2015) .....	33
<i>Carter v. Bryant</i> , 429 S.C. 298, 838 S.E.2d 523 (Ct. App. 2020) .....	21
<i>Castillo v. Holder</i> , 776 F.3d 262 (4th Cir. 2015) .....	17
<i>Descamps v. United States</i> , 570 U.S. 254, 272 & n.4 (2013) .....	15
<i>Doe v. State</i> , 421 S.C. 490, 808 S.E.2d 807 (2017) .....	8, 31
<i>Garren v. State</i> , 423 S.C. 1, 813 S.E.2d 704 (2018) .....	21, 37
<i>In re Care and Treatment of Miller</i> , 385 S.C. 539, 685 S.E.2d 619 (Ct. App. 2009) .....	37
<i>Moore v. Moore</i> , 376 S.C. 467, 657 S.E.2d 743 (2008) .....	36
<i>Rogers v. State</i> , 358 S.C. 266, 594 S.E.2d 278 (Ct. App. 2004) .....	37
<i>Staples v. United States</i> , 511 U.S. 600 (1994) .....	38
<i>State v. Am. Ag. Chem. Co.</i> , 118 S.C. 333, 110 S.E. 800 (1922) .....	10

<i>State v. Blackmon</i> , 304 S.C. 270, 403 S.E.2d 660 (1991) .....	8, 20, 40
<i>State v. Bridgers</i> , 329 S.C. 11, 495 S.E.2d 196 (1997) .....	23
<i>State v. Brown</i> , 274 S.C. 506, 266 S.E.2d 64 (1989) .....	8, 9, 21
<i>State v. Bryant</i> , 316 S.C. 216, 447 S.E.2d 852 (1994) .....	8, 21, 40
<i>State v. Fennell</i> , 340 S.C. 266, 531 S.E.2d 512 (2000) .....	18
<i>State v. Ferguson</i> , 302 S.C. 269, 395 S.E.2d 182 (1990) .....	3, 5-6, 7, 10
<i>State v. Foust</i> , 325 S.C. 12, 479 S.E.2d 50 (1996) .....	33
<i>State v. Golston</i> , 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012) .....	37, 38
<i>State v. Guderyon</i> , --- S.E.2d ----, 2022 WL 17480097 (S.C. Ct. App. Dec. 7, 2022) .....	17, 21
<i>State v. Guderyon</i> , No. 2017-002168, (S.C. Ct. App. Jan. 3, 2019) .....	17
<i>State v. Hardin</i> , 425 S.C. 1, 819 S.E.2d 177 (Ct. App. 2018) .....	21
<i>State v. Henkel</i> , 413 S.C. 9, 774 S.E.2d 458 (2015) .....	8
<i>State v. Hernandez</i> , 428 S.C. 257, 834 S.E.2d 462 (2019) (per curiam) .....	23
<i>State v. Jefferies</i> , 316 S.C. 13, 446 S.E.2d 427 (1994) .....	<i>passim</i>
<i>State v. Jones</i> , 133 S.C. 167, 130 S.E. 747 (1925) .....	33

<i>State v. King</i> , 422 S.C. 47, 810 S.E.2d 18 (2017) .....	4, 16, 20, 23, 24, 30
<i>State v. McGowan</i> , 430 S.C. 373, 845 S.E.2d 503 (Ct. App. 2020) .....	14
<i>State v. McLeod</i> , 354 S.C. 40, 579 S.E.2d 534 (Ct. App. 2003) .....	37
<i>State v. Middleton</i> , 407 S.C. 312, 755 S.E.2d 432 (2014) .....	13, 19
<i>State v. Miles</i> , 421 S.C. 154, 805 S.E.2d 204 (Ct. App. 2017) .....	19-20, 38
<i>State v. Morris</i> , 376 S.C. 189, 656 S.E.2d 359 (2008) .....	10
<i>State v. Nesbitt</i> , 346 S.C. 226, 550 S.E.2d 864 (Ct. App. 2001) .....	4
<i>State v. Pittman</i> , 373 S.C. 527, 647 S.E.2d 144 (2007) .....	6
<i>State v. Reid</i> , 393 S.C. 325, 713 S.E.2d 274 (2011) .....	4
<i>State v. Robinson</i> , 437 S.C. 226, 878 S.E.2d 8 (Ct. App. 2022) .....	16
<i>State v. Senter</i> , 396 S.C. 547, 722 S.E.2d 233 (Ct. App. 2011) .....	37
<i>State v. Smith</i> , 430 S.C. 226, 845 S.E.2d 495 (2020) .....	13, 17, 18, 19
<i>State v. Sterling</i> , 396 S.C. 599, 723 S.E.2d 176 (2012) .....	<i>passim</i>
<i>State v. Sussewell</i> , 149 S.C. 128, 146 S.E. 697 (1929) .....	11
<i>State v. Watson</i> , 349 S.C. 372, 563 S.E.2d 336 (2002) .....	7

<i>State v. Williams</i>	
430 S.C. 136, 844 S.E.2d 57 (2020) .....	18, 19
<i>State v. Workman,</i>	
437 S.C. 62, 876 S.E.2d 151 (Ct. App. 2022) .....	37
<i>State v. Wright,</i>	
349 S.C. 310, 563 S.E.2d 311 (2002) .....	38, 39
<i>Sullivan Mgmt., LLC v. Fireman’s Fund Ins. Co.,</i>	
437 S.C. 587, 879 S.E.2d 742 (2022) .....	3
<i>Thomerson v. DeVito,</i>	
430 S.C. 246, 844 S.E.2d 378 (2020) .....	3
<i>United States v. Bailey,</i>	
444 U.S. 394 (1980) .....	3, 6
<i>United States v. Clemons,</i>	
No. 22-4152, 2022 WL 4758368 (4th Cir. Oct. 3, 2022) .....	1, 2, 17
<i>United States v. Drummond,</i>	
925 F.3d 681 (4th Cir. 2019) .....	33, 34
<i>United States v. McFalls,</i>	
592 F.3d 707 (6th Cir. 2010) .....	11
<i>Voisine v. United States,</i>	
No. 14-10154, 2016 WL 344487 .....	11

**Statutes**

S.C. Code Ann. § 16–3–29 .....	13
S.C. Code Ann. § 16–3–60 (Supp. 2009) .....	22
S.C. Code Ann. § 16–3–510 (Supp. 2009) .....	22
S.C. Code Ann. § 16–3–600 .....	1, 2, 13, 16
S.C. Code Ann. § 16–3–600(B)(1) .....	13
S.C. Code Ann. § 16–3–600(B)(3) .....	13
S.C. Code Ann. § 16–3–600(C)(1) .....	14
S.C. Code Ann. § 16–3–600(C)(3) .....	13
S.C. Code Ann. § 16–3–600(D)(1) .....	14, 15

S.C. Code Ann. § 16–3–600(D)(1) (Supp. 2015) .....	11
S.C. Code Ann. § 16–3–600(D)(3) .....	13
S.C. Code Ann. § 16–3–600(E)(1) .....	14, 15
S.C. Code Ann. § 16–3–600(E)(1) (Supp. 2015).....	11
S.C. Code Ann. § 16–3–600(E)(3) .....	13
S.C. Code Ann. § 16–3–620 .....	12
S.C. Code Ann. § 16–3–910 (1985) .....	9
S.C. Code Ann. § 16–17–430 (1976) .....	8-9
S.C. Code Ann. § 16–25–20 .....	29
S.C. Code Ann. § 16–25–20(A) (1984) .....	29
S.C. Code Ann. § 16–25–20(A) .....	34
S.C. Code Ann. § 16–25–20(A)(1) .....	30
S.C. Code Ann. § 16–25–20(A)(2) .....	30
S.C. Code Ann. § 16–25–20(B) (1984) .....	29
S.C. Code Ann. § 16–25–20(C) (Supp. 2015) .....	11
S.C. Code Ann. § 16–25–20(D) (Supp. 2015) .....	11
S.C. Code Ann. § 16–25–20(E) .....	27
S.C. Code Ann. § 16–25–65 .....	1, 2, 30
S.C. Code Ann. § 16–25–65(A) .....	39
S.C. Code Ann. § 16–25–70 .....	34
S.C. Code Ann. § 16–25–70(D).....	35
S.C. Code Ann. § 35–1–501(3) (Supp. 2010) .....	9
S.C. Code Ann. § 50–21–115 (Supp. 2009) .....	22
S.C. Code Ann. § 56–5–2910 (Supp. 2009) .....	22

**Other**

17 S.C. Jur. <i>Criminal Domestic Violence</i> , § 14 (Supp. 2007) .....	36
17 S.C. Jur. <i>Criminal Domestic Violence</i> , § 2 (Supp. 2023) .....	31
21 Am. Jur. 2d <i>Criminal Law</i> § 113 (Supp. 2023) .....	5
73 Am. Jur. 2d <i>Statutes</i> § 97, at 336 (2012) .....	8

1984 S.C. Acts 484 (effective date June 22, 1984) .....	25
1994 S.C. Acts 519 (effective date Sept. 23, 1994) .....	25-26
2003 S.C. Acts 92 (effective date Jan. 1, 2004) .....	27
2005 S.C. Acts 166 (effective date Jan. 1, 2006) .....	28
2008 S.C. Acts 255 (effective date June 4, 2008) .....	28
2010 S.C. Acts 273 (effective date June 2, 2010) .....	19, 24
2015 S.C. Acts 58 (effective date June 4, 2015) .....	11, 28
C. Wright & A. Leipold, <i>Federal Practice and Procedure: Criminal</i> § 125 (4th ed. 2008) .....	15
Christina L. Myers, <i>South Carolina still near bottom in violence against women,</i> <i>A.P. News</i> (Feb. 11, 2019) .....	32
Joshua Dressler, <i>CRIMINAL LAW 112</i> (West 1994) .....	5
McAninch, Fairey, and Coggiola, <i>The Criminal Law of South Carolina</i> 2 (6th ed. 2013) .....	5
Ralph King Anderson, Jr., <i>ANDERSON’S REQUESTS TO CHARGE—CRIMINAL</i> § 2-20 (2d ed. 2012) .....	15
S. Journal, 121st Leg. Sess. (S.C. Feb. 24, 2015) .....	32
S. Journal, 121st Leg. Sess. (S.C. Feb. 25, 2015) .....	32
South Carolina Sentencing Reform Commission, <i>Report to the General Assembly</i> (Feb. 1, 2010) .....	12
W. LaFave, J. Israel, N. King, & O. Kerr, <i>CRIMINAL PROCEDURE</i> § 19.3(a) (3d ed. 2007) .....	15

## **STATEMENT OF THE ISSUES**

- I. What mental state is required to commit South Carolina Assault and Battery Second Degree, in violation of S.C. Code Ann. § 16–3–600?
- II. 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, Patrick Fitzgerald Clemons was charged in a superseding indictment in the United States District Court for the District of South Carolina. *United States v. Clemons*, No. 22-4152, 2022 WL 4758368, at \*1 (4th Cir. Oct. 3, 2022) (unpublished). He pleaded guilty to being a felon in possession of a firearm. *Id.*

The United States Probation Office determined Clemons was subject to a raised mandatory minimum sentence based on a prior conviction for South Carolina Assault and Battery Second Degree (AB2d) and two convictions for South Carolina Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN). *Id.* Clemons argued none of these convictions qualified to enhance his sentence under the United States Supreme Court’s decision in *Borden v. United States*, 141 S.Ct. 1817, 1825 (2021), which held that a prior conviction can only be the basis for an enhanced sentence if the offense has as an element the use, attempted use, or threatened use of force directed at, or targeting, another individual. *Clemons*, 2022 WL 4758368, at \*1.

In February 2022, the federal district court convened for sentencing. *Id.* The court determined Clemons' AB2d and CDVHAN convictions qualified him for a raised mandatory minimum sentence. *Id.* On the Government's motion, it sentenced Clemons to 145 months in prison. *Id.* Clemons filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit the same day. *Id.*

Clemons argued before the Fourth Circuit that AB2d and CDVHAN cannot serve to enhance his sentence because they can be committed recklessly or negligently. *Id.* The Fourth Circuit determined that the CDVHAN and AB2d statutes do not describe the *mens rea* required for commission of the offenses, and the court was unable to find controlling South Carolina case law resolving the issues. *Id.* The Fourth Circuit further found that determining the required mental state for commission of the two offenses is necessary to resolve Clemons' appeal, and the issues have arisen frequently in federal court. *Id.* Because the Fourth Circuit was "unable to predict with confidence" how this Court would rule, on October 3, 2022, the court requested that this Court accept and answer two certified questions:

1. What mental state is required to commit South Carolina Assault and Battery Second Degree, in violation of S.C. Code § 16-3-600; and
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 § 16-25-65?

*Id.* at \*1-2. On October 26, 2022, this Court accepted certification of these two questions. *United States v. Clemons*, S.C. Sup. Ct. Order dated Oct. 26, 2022.

## STANDARD OF REVIEW

“[The] standard of review when answering a certified question depends on the context of the case.” *Sullivan Mgmt., LLC v. Fireman’s Fund Ins. Co.*, 437 S.C. 587, 590, 879 S.E.2d 742, 743 (2022). “Typically, when a novel issue of law is raised, [the Court is] ‘free to decide 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.’” *Id.* (quoting *Thomerson v. DeVito*, 430 S.C. 246, 249, 844 S.E.2d 378, 380 (2020)).

## ARGUMENT

The level of criminal intent required to show commission of an offense that does not state a *mens rea* is a “question[] of legislative intent.” *State v. Ferguson*, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990). The statutory text and legislative history of the Assault and Battery and Criminal Domestic Violence statutes establish that AB2d and CDVHAN can be committed only by intentional conduct.

### **I. Principles of *Mens Rea* in South Carolina Law**

“‘Criminal liability is normally based upon the concurrence of two factors, an evil meaning mind and an evil doing hand.’” *State v. Jefferies*, 316 S.C. 13, 17, 446 S.E.2d 427, 430 (1994) (quoting *United States v. Bailey*, 444 U.S. 394, 402 (1980)) (quotation marks and alteration omitted). So “ordinarily, in order to establish criminal liability, a criminal intent of some form is required.” *Ferguson*, 302 S.C.

at 271, 395 S.E.2d at 183. As this Court explained in *Jefferies*, “[a]t common law, crimes generally were classified as requiring either general intent or specific intent.” 316 S.C. at 18, 446 S.E.2d at 430 (quotation marks omitted). But that distinction “has been the source of a good deal of confusion,” and “the commentators and Model Penal Code have rejected the traditional dichotomy in favor of the hierarchical approach.” *Id.*

### **A. Specific Intent vs. General Intent**

“At common law, a crime requiring ‘specific intent’ required a higher level of *mens rea* than those requiring ‘general intent.’” *Jefferies*, 316 S.C. at 19 n.9, 446 S.E.2d at 431 n.9. South Carolina courts most often discuss specific intent in the context of attempt crimes, when “specific intent means the defendant intended to complete the acts comprising the underlying offense.” *State v. Reid*, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) (addressing attempted criminal sexual conduct). For example, attempted murder requires the specific intent to kill the victim, *State v. King*, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017), and attempted armed robbery requires the specific intent to rob the establishment, *State v. Nesbitt*, 346 S.C. 226, 231, 550 S.E.2d 864, 866–67 (Ct. App. 2001). This Court has described specific intent as the “highest possible mental state,” *King*, 422 S.C. at 56, 810 S.E.2d at 22, and explained that it “loosely corresponds with the more modern concept of ‘purpose,’” *Jefferies*, 316 S.C. at 19 n.9, 446 S.E.2d at 431 n.9.

“Sometimes specific intent is used to refer to offenses including a *mens rea* element of purpose or knowledge, with ‘general intent’ reserved for offenses requiring a less culpable state of mind, such as recklessness or negligence.” McAninch, Fairey, and Coggiola, *THE CRIMINAL LAW OF SOUTH CAROLINA* 2 (6th ed. 2013) (citing Joshua Dressler, *CRIMINAL LAW* 112 (West 1994)). “Other times,” however, “general intent is used in a more generic sense to refer to whatever mental state is required by a given offense, ranging from purpose to negligence.” *Id.* “General intent,” then, is “the term used to define the requisite *mens rea* for a crime that has no stated *mens rea*.” 21 Am. Jur. 2d Criminal Law § 113. No South Carolina case holds a “general intent” crime is necessarily one that can be committed recklessly or negligently.

## **B. The Hierarchical Approach**

“Given the shortcomings of the traditional specific intent/general intent approach to *mens rea*, a movement developed toward a system of classification capable of greater precision.” McAninch, *supra*, at 2. South Carolina adopted this approach in *Jefferies*: “The required *mens rea* for a particular crime can be classified into a hierarchy of culpable states of mind in descending order of culpability, as purpose, knowledge, recklessness, and negligence.” *Jefferies*, 316 S.C. at 18, 446 S.E.2d at 430; *accord Ferguson*, 302 S.C. at 271, 395 S.E.2d at 183 (“[T]he mental

state required to be proven by the State for a particular crime might be purpose (intent), knowledge, recklessness, or criminal negligence.”).

“‘Purpose’ is the highest level of *mens rea* known in criminal law.” *Jefferies*, 316 S.C. at 19, 446 S.E.2d at 431. A person acts purposefully “if he consciously desires” the particular result he caused, “whatever the likelihood of that result happening from his conduct.” *Id.* at 19 n.7, 446 S.E.2d at 430 n.7 (quotation marks omitted). A person acts knowingly if he is aware that the result he caused was “practically certain to follow from his conduct, whatever his desire may be as to that result.” *Id.* at n.8, 446 S.E.2d at 430 n.8 (quotation marks omitted). A person acts with criminal recklessness when he is aware of his conduct but consciously disregards a risk that his conduct is creating. *State v. Pittman*, 373 S.C. 527, 571, 647 S.E.2d 144, 166 (2007). And a person “acts with criminal negligence when he inadvertently creates a substantial and unjustifiable risk of which he ought to be aware.” *See State v. Sterling*, 396 S.C. 599, 616 n.10, 723 S.E.2d 176, 186 n.10 (2012).

In *Borden v. United States*, 141 S.Ct. 1817, 1823 (2021), the United States Supreme Court explained that “[p]urpose and knowledge are the most culpable levels in the criminal law’s mental-state ‘hierarchy.’” The Court characterized the difference between purpose and knowledge as “‘limited,’” noting it “‘has not been considered important’ for many crimes.” *Id.* (quoting *Bailey*, 444 U.S. at 404). It

distinguished purpose and knowledge from recklessness and negligence, describing the latter two as “less culpable mental states” that “involve insufficient concern with a risk of injury.” *Id.* at 1824. The Court also noted that some states recognize a “depraved heart” or “extreme recklessness” mental state, which falls somewhere between recklessness and knowledge.<sup>1</sup> *Id.* at 1825 n.4. South Carolina is such a state. *See, e.g., State v. Watson*, 349 S.C. 372, 376 n.5, 563 S.E.2d 336, 338 n.5 (2002) (noting murder requires malice, and “extreme recklessness can lead to an inference of malice”).

### **C. *Mens Rea* in Statutory Offenses**

When creating a statutory offense, the General Assembly may determine what level of criminal intent is required, or it may decide an act or omission is a crime regardless of intent, thus creating a “strict liability” offense. *Ferguson*, 302 S.C. at 271–72, 395 S.E.2d at 183–84. That the legislature did not include a mental state in a crime or a particular element of a crime does not mean it intended that crime or element to be one of strict liability. *McAninch, supra*, at 4 (citing *Jefferies*, 316 S.C. 13, 446 S.E.2d 427; *Ferguson*, 302 S.C. 269, 395 S.E.2d 182). In such cases, this Court “look[s] to common law and the development of the statute to determine

---

<sup>1</sup> In this brief, the Government refers collectively to “depraved heart” or “extreme recklessness,” purpose, and knowledge as mental states requiring intentional conduct.

whether the legislature intended the crime to require a *mens rea*.” *Jefferies*, 316 S.C. at 18, 446 S.E.2d at 430. In determining legislative intent, the Court may look to “the historical evolution of the statute at issue.” *Doe v. State*, 421 S.C. 490, 499 n.6, 808 S.E.2d 807, 811 n.6 (2017) (citing 73 Am. Jur. 2d *Statutes* § 97, at 336 (2012)).

“[A]ll 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 light of the intended purpose of the statute.” *State v. Henkel*, 413 S.C. 9, 14, 774 S.E.2d 458, 461 (2015) (quotation marks and alteration omitted). So “[w]hether intent is a necessary element of the statutory crime must be determined from the language of the statute construed in light of its purpose and design.” *State v. Bryant*, 316 S.C. 216, 219, 447 S.E.2d 852, 854 (1994). And although the Court “should not weaken the legislators’ decision to criminalize [certain acts] by imposing a high standard of intent,” *Sterling*, 396 S.C. at 616, 723 S.E.2d at 185, penal statutes “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).

This Court has repeatedly analyzed statutes that omit a *mens rea* requirement and determined they criminalize only intentional conduct. For example, in *State v. Brown*, the Court analyzed a statute that made it “unlawful for any person anonymously or otherwise” to use profane language or threaten an unlawful act in a telephonic communication. 274 S.C. 506, 266 S.E.2d 64 (1989) (citing S.C. Code

Ann. § 16–17–430 (1976)). The Court “construe[d] the quoted portion of the statute as proscribing only calls initiated by one *with the intent and sole purpose* of conveying an unsolicited obscene, imminently threatening and/or harassing message to an unwilling recipient.” *Id.* at 508, 266 S.E.2d at 65 (emphasis added).

In *Jefferies*, the Court addressed the kidnapping statute, which makes it a crime to “unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away” a person without authority of law. 316 S.C. at 19 n.4, 446 S.E.2d at 430 n.4 (quoting S.C. Code Ann. § 16–3–910 (1985)). Because the statute “does not expressly state whether a *mens rea* is required,” the Court traced the history of the statute and ultimately found no evidence the General Assembly intended to make kidnapping a strict liability crime. *Id.* at 19, 446 S.E.2d at 430. It therefore concluded the *mens rea* of “knowledge” was required. *Id.* at 19, 446 S.E.2d at 430–31.

And in *Sterling*, the Court considered a securities fraud statute that made it “unlawful for a person, in connection with the offer, sale, or purchase of a security” to defraud another. 396 S.C. at 614, 723 S.E.2d at 184 (quoting S.C. Code Ann. § 35–1–501(3) (Supp. 2010)). The Court observed that when the General Assembly does not state a *mens rea*, courts should be reluctant to impose the highest form, lest they run the risk of weakening its decision to criminalize disfavored conduct. *Id.* at 616, 723 S.E.2d at 185. But the Court did not condone imposing the lowest form of *mens rea*, either. Instead, the Court analyzed the securities fraud statute and its

penalty provision, and it concluded the proper *mens rea* was “knowing misconduct or severe recklessness.” *Sterling*, 396 S.C. at 615, 723 S.E.2d at 185 (citing *State v. Morris*, 376 S.C. 189, 202 n.5, 656 S.E.2d 359, 366 n.5 (2008)).

Clemons points to this Court’s decision in *Ferguson*, Opening Br. at 14–15, 21, which held a drug distribution statute that does not enumerate a *mens rea* requires the State to “show that a given defendant was at least criminally negligent when he/she manufactured, distributed, or dispensed a controlled substance[.]” 302 S.C. at 273, 395 S.E.2d at 184. But *Ferguson* did not hold that *any* statute omitting an express mental state can be violated by negligent conduct. It stated only that ““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.”” 302 S.C. at 272, 395 S.E.2d at 183 (quoting *State v. Am. Ag. Chem. Co.*, 118 S.C. 333, 337, 110 S.E. 800 (1922)). Consistent with *Jefferies* and *Sterling*, *Ferguson* emphasized the importance of evaluating the entire statutory scheme to determine what mental state requirement the General Assembly meant to impose. *Id.* at 272–73, 395 S.E.2d at 184 (“A reading of the entire statutory scheme convinces us that the legislature intended to place a mental state requirement in the offense[.]”). As explained below, the Assault and Battery and Criminal Domestic

Violence statutory schemes adopted by the General Assembly reflect an intent to criminalize only intentional conduct.<sup>2</sup>

## **II. Second-Degree Assault and Battery Can Only Be Committed By Intentional Conduct.**

The text and legislative history of the Assault and Battery statute establish that the Assault and Battery offenses cannot be committed recklessly or negligently. In

---

<sup>2</sup> In 2016, the Solicitor General of the United States filed an appendix to a brief before the United States Supreme Court that included AB2d and CDV in a 50-state survey of offenses that could be committed by recklessness or less. *See Voisine v. United States*, Br. for the United States, No. 14-10154, 2016 WL 344487, at \*10aa, \*15aa (U.S. Supreme Court Jan. 19, 2016).

Appendix B listed Second- and Third-Degree Assault and Battery—as codified at §§ 16–3–600(D)(1) and (E)(1)—as “state misdemeanor assault and battery statutes in effect” in 1996. *Id.* at \*1aa, \*10aa. But AB2d and AB3d did not exist until 2010. *See* 2010 S.C. Acts 273.

Appendix C listed CDV as a “state misdemeanor domestic violence statute[] requiring recklessness or less” in effect in 1996. *Voisine*, Br. for the United States, 2016 WL 344487, at \*14–15aa. It relied on Second- and Third-Degree CDV—as codified at §§ 16–25–20(C) and (D)—and their “interplay between assault and battery.” *Id.* But South Carolina did not adopt degrees of domestic violence until 2015. *See* 2015 S.C. Acts 58. The version of the CDV statute the Solicitor General analyzed was not, in fact, in effect in 1996.

Most importantly, the Solicitor General included AB2d and CDV in the list of “reckless” offenses based only on two authorities—*United States v. McFalls*, 592 F.3d 707 (6th Cir. 2010), and *State v. Sussewell*, 149 S.C. 128, 146 S.E. 697 (1929)—that do not involve AB2d or CDV; they interpret abolished common-law offenses. And his concession was based on “decisions holding that the mental state for *assault* may include reckless conduct,” *Voisine*, Br. for the United States, 2016 WL 344487, at \*15aa (emphasis added), which Clemons agrees was wrong, *see* Opening Br. at 8 (“At common law, assault was a specific intent crime[.]”). For these reasons, and those explained below, the Solicitor General’s inclusion of AB2d and CDV on the list of “reckless” offenses was error.

2008, the South Carolina General Assembly created a Sentencing Reform Commission tasked with addressing “[r]ising recidivism rates, increasing prison populations, limited sentencing alternatives and re-entry programs, and mounting correctional costs.” South Carolina Sentencing Reform Commission, *Report to the General Assembly* 1 (Feb. 1, 2010).<sup>3</sup> The Commission concluded “[p]rison space should be reserved for violent criminals and those with violent tendencies,” and it made detailed recommendations to increase public safety by, in relevant part, “ensuring that there is prison space for high-risk, violent offenders” and “that those offenders serve longer terms in prison.” *Id.* at 2.

One such recommendation was that the General Assembly

Enact legislation to restructure by statute the degrees of assault and battery, including the existing common law and statutory offenses, so that the common law offense of “Assault and Battery of a High and Aggravated Nature” is abolished, and the statutory offense of “Assault and Battery with Intent to Kill” (Section 16–3–620), is repealed. In the legislation, establish graduated offenses of “Assault and Battery,” to include “Attempted Murder,” “Aggravated Assault and Battery,” and “Assault and Battery,” with commensurate penalties.

*Id.* at 21–22.

The General Assembly heeded the call. In 2010, it passed the Omnibus Crime Reduction and Sentencing Reform Act (the Act), which substantially overhauled

---

<sup>3</sup><http://www.scstatehouse.gov/Archives/CitizensInterestPage/SentencingReformCommission/CombinedFinalReport020110SigPage.pdf> (accessed Feb. 20, 2023).

South Carolina’s criminal code. *See* 2010 S.C. Acts 273 (effective date June 2, 2010). “Through the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses.” *State v. Middleton*, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014). The General Assembly replaced these offenses with Attempted Murder and four degrees of Assault and Battery. *Id.*; *see* S.C. Code Ann. §§ 16–3–29, 16–3–600 (Supp. 2021).

The new degrees of Assault and Battery are: Assault and Battery of a High and Aggravated Nature (ABHAN) and Assault and Battery in the First (AB1st), Second (AB2d), and Third (AB3d) Degrees. *Middleton*, 407 S.C. at 315, 755 S.E.2d at 434; *see* S.C. Code Ann. § 16–3–600. ABHAN is a lesser-included offense of Attempted Murder. S.C. Code Ann. § 16–3–600(B)(3). AB1st is a lesser-included offense of Attempted Murder and ABHAN. S.C. Code Ann. § 16–3–600(C)(3). And AB2d and AB3d are each lesser-included offenses of every preceding offense. S.C. Code Ann. §§ 16–3–600(D)(3), (E)(3).

Each species of statutory Assault and Battery includes the same operative language. ABHAN—the most severe Assault and Battery offense—is committed when one “unlawfully injures another person” and either great bodily injury results or the act is accomplished by means likely to produce death or great bodily injury. S.C. Code Ann. § 16–3–600(B)(1). This Court has stated that ABHAN is a general-intent crime. *State v. Smith*, 430 S.C. 226, 234 n.9, 845 S.E.2d 495, 499 n.9 (2020).

First-, Second-, and Third-Degree Assault and Battery all criminalize both “unlawfully injur[ing]” another and unlawfully “offer[ing] or attempt[ing] to injure another person with present ability to do so.” S.C. Code Ann. §§ 16–3–600(C)(1), (D)(1), (E)(1). The various degrees are distinguished primarily by the seriousness of the injury inflicted, offered, or attempted.

AB1st is committed

if the person *unlawfully*:

(a) *injures* another person, and the act:

- (i) involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent; or
- (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft; *or*

(b) *offers or attempts* to injure another person with the present ability to do so, and the act:

- (i) is accomplished by means likely to produce death or great bodily injury; or
- (ii) occurred during the commission of a robbery, burglary, kidnapping, or theft.

S.C. Code Ann. § 16–3–600(C)(1) (emphasis added). The Court of Appeals has held the “offers or attempts” alternative of AB1st is a specific-intent crime. *State v. McGowan*, 430 S.C. 373, 380, 845 S.E.2d 503, 506 (Ct. App. 2020).

AB2d is drafted differently. A person commits AB2d if he

*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) (emphasis added).<sup>4</sup> Assuming Clemons is correct that “unlawfully injur[ing]” and unlawfully “offer[ing] or attempt[ing] to injure” another are two separate crimes, Opening Br. at 10, 13, both require intentional conduct.<sup>5</sup>

---

<sup>4</sup> AB3d is the same. A person commits AB3d if he “unlawfully injures another person, or offers or attempts to injure another person with the present ability to do so.” S.C. Code Ann. § 16–3–600(E)(1).

<sup>5</sup> When a statute sets out one or more elements in the alternative, as opposed to alternative means of violating the statute, a prosecutor charging a violation of the statute “must generally select the relevant element from its list of alternatives.” *Descamps v. United States*, 570 U.S. 254, 272 & n.4 (2013) (citing 1 C. Wright & A. Leipold, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 125, pp. 550–551 (4th ed. 2008) (“If a single statute sets forth several different offenses, [a] pleading . . . that does not indicate which crime [the] defendant allegedly committed is insufficient”); 5 W. LaFare, J. Israel, N. King, & O. Kerr, CRIMINAL PROCEDURE § 19.3(a), p. 263 (3d ed. 2007) (“[W]here a statute specifies several different ways in which the crime can be committed, [courts often] hold that the pleading must refer to the particular alternative presented in the individual case.”)).

If, as Clemons claims, the AB2d statute sets forth offenses with two separate *mens rea* elements—*i.e.*, a battery that can be committed recklessly and an assault that requires specific intent—it sets forth offenses that should be separately indicted and proven beyond a reasonable doubt. But South Carolina juries are charged that “unlawfully injuring OR offering or attempting to injure” is a single element of AB2d. See John R. Ferguson, CRIMINAL OFFENSES IN SOUTH CAROLINA § 5:19 (3d ed. 2014); Ralph King Anderson, Jr., ANDERSON’S REQUESTS TO CHARGE—

Clemons concedes the “offers or attempts to injure” alternative requires specific intent. *Id.* at 13. Specific intent is the “highest possible mental state,” *King*, 422 S.C. at 56, 810 S.E.2d at 22; it “loosely corresponds with the more modern concept of ‘purpose,’” *Jefferies*, 316 S.C. at 19 n.9, 446 S.E.2d at 431 n.9. This alternative clearly requires intentional conduct.

The “unlawfully injures” alternative also requires something more than reckless behavior. ABHAN, AB1st, AB2d, and AB3d all prohibit, at least in part, the same conduct: “unlawfully injur[ing]” another.<sup>6</sup> S.C. Code Ann. § 16–3–600. It is the result—the degree of injury—that differentiates the offenses. *See State v. Robinson*, 437 S.C. 226, 233, 878 S.E.2d 8, 12 (Ct. App. 2022) (“In each subsection, the Legislature uses varying degrees to define the type of injury that must occur to constitute that level of assault and battery.”).

---

CRIMINAL § 2-20 (2d ed. 2012) (AB2d charge stating the first thing the State must prove is that “the defendant unlawfully injured another person, or offered or attempted to injure another person with the present ability to do so”).

<sup>6</sup> Clemons’ suggestion that “unlawfully” may be the *mens rea* associated with AB2d’s battery offense, Opening Br. at 13–14, is inconsistent with his concession that the statute does not enumerate a *mens rea*, *see id.* at 13 (“the General Assembly did not provide a *mens rea* for . . . the battery”). It is also inconsistent with this Court’s repeated recognition that statutes merely making conduct “unlawful” omit express *mens rea* requirements. *See Sterling*, 396 S.C. at 616, 723 S.E.2d at 185 (“We are within our authority to determine the level of intent required for a violation of the securities fraud statute because the legislature did not specify any *mens rea*.”); *Jefferies*, 316 S.C. at 18, 446 S.E.2d at 430 (“we must determine what, if any, *mens rea* is required for the crime of kidnapping”).

“Unlawfully injur[ing]” carries the same meaning in all four subsections of the statute: intent. In *State v. Guderyon*, the Court of Appeals affirmed a jury charge directing that to convict a defendant of ABHAN, “the State must prove beyond a reasonable doubt that *the Defendant intended to unlawfully injure* another person[.]” --- S.E.2d ----, 2022 WL 17480097, at \*4, \*8 (S.C. Ct. App. Dec. 7, 2022) (emphasis added); *see also State v. Guderyon*, No. 2017-002168, Final Br. of Resp. (Amended) at 20 (S.C. Ct. App. Jan. 3, 2019) (“The trial judge correctly explained that all degrees of assault and battery require only a *general intent to injure* and that the severity and type of harm are what differentiate these offenses from each other.” (emphasis added)). The court held the jury instructions “adequately addressed the law.”<sup>7</sup> *Id.* at \*8. ABHAN, and therefore AB2d, requires an intent to injure.

In *Smith*, this Court noted there is “no question . . . as to the applicability of the doctrine of transferred intent” to ABHAN because it is a general-intent crime.

---

<sup>7</sup> *Guderyon* had not been decided when the Fourth Circuit Court of Appeals certified to this Court the question of what mental state is required to commit AB2d. At the time of certification, the Fourth Circuit found “no controlling South Carolina authority directly answer[ed]” the question. *Clemons*, 2022 WL 4758368, at \*1.

The Fourth Circuit may not reach the same conclusion today. “[T]o the extent that the statutory definition of [a state] offense has been interpreted by the state’s appellate courts, that interpretation constrains [the Fourth Circuit’s] analysis of the elements of state law.” *Castillo v. Holder*, 776 F.3d 262, 268 (4th Cir. 2015) (quotation marks omitted). *Guderyon* would therefore control the Fourth Circuit’s determination of the mental state required to commit AB2d. But because *Guderyon* is not binding precedent from this Court, the issue is still appropriate for certification under Rule 244, SCACR.

*Smith*, 430 S.C. at 234 n.9, 845 S.E.2d at 499 n.9. That transferred intent applies to ABHAN establishes that “general intent,” at least in this context, “is used in a more generic sense to refer to whatever mental state is required by a given offense,” not to describe a “less culpable state of mind, such as recklessness or negligence.” *See McAninch, supra*, at 2. It further shows that ABHAN requires true intent, not recklessness.

“The defendant’s mental state, or *mens rea*, whatever it may be at the time he allegedly commits a criminal act, is contained within the defendant’s brain when he commits the act.” *State v. Fennell*, 340 S.C. 266, 271, 531 S.E.2d 512, 515 (2000). Under the doctrine of transferred intent, “a defendant may be found guilty of murder or manslaughter in a case of bad or mistake aim” if “the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another.” *Id.* at 272, 531 S.E.2d at 515. “Although the defendant did not act with malice toward the unintended victim, the defendant’s criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim.” *Id.* The doctrine necessarily contemplates a crime that requires a purposeful mental state.

Transferred intent was applied to ABHAN in *State v. Williams*, where the defendant fired a gun approximately ten times, hitting his intended victim five times and killing him, but also hitting a bystander once. 430 S.C. 136, 144, 844 S.E.2d 57, 62 (2020). He was convicted of voluntary manslaughter as to the intended victim

and ABHAN as to the unintended victim. *Id.* at 141, 844 S.E.2d at 60. The trial court instructed the jury that it could convict the defendant of ABHAN based on transferred intent: “Transferred intent is used when a defendant intends to harm one victim, but then unintentionally harms a second victim instead. In this case the defendant’s intent transfer[red] from the intendant victim to the actual victim.” *State v. Williams*, No. 2015-0001727, Record on Appeal at 875 (S.C. Ct. App. May 19, 2017). If ABHAN could be committed recklessly, there would have been no need to instruct on transferred intent. Similarly, this Court’s discussion about transferred intent in *Smith* would have been unnecessary if ABHAN requires only recklessness. But ABHAN—and therefore every other iteration of statutory Assault and Battery—requires intentional conduct.

The legislative history of the Assault and Battery statute bolsters this conclusion. The Omnibus Crime Reduction and Sentencing Reform Act “substantially overhauled the state’s criminal law.” *Middleton*, 407 S.C. at 315, 755 S.E.2d at 434. Its text spans nearly 100 pages. *See Acts, 2010 Session, Act No. 273, SOUTH CAROLINA LEGISLATURE.*<sup>8</sup> “Given this background, if ever [the Court is] justified in reading a statute, not narrowly as through a keyhole, but in the broad light of the evils it aimed at and the good it hoped for, it is here.” *See State v. Miles*,

---

<sup>8</sup> [https://www.scstatehouse.gov/sess118\\_2009-2010/bills/10actsp1.php](https://www.scstatehouse.gov/sess118_2009-2010/bills/10actsp1.php) (accessed Feb. 20, 2023).

421 S.C. 154, 163, 805 S.E.2d 204, 209 (Ct. App. 2017) (evaluating South Carolina drug trafficking laws) (quotation marks and alteration omitted).

The evils the General Assembly aimed at in passing the Act were “rising recidivism rates, increasing prison populations, limited sentencing alternatives and re-entry programs, and mounting correctional costs for both state and local governments.” *See King*, 422 S.C. at 63, 810 S.E.2d at 26 (quotation marks omitted); *Report to the General Assembly, supra*, at 1–2. In the face of the Sentencing Reform Commission’s finding that “incarceration is best used for violent crimes and offenders,” and that high-risk, violent offenders should serve significant prison sentences, the General Assembly abolished every common-law assault offense and created an entirely new statutory scheme. *See Report to the General Assembly, supra*, at 9. There is no indication that in doing so, the legislature intended to wholesale import the common law into the new statute and criminalize less than intentional conduct.

In addition to honoring legislative intent, concluding the Assault and Battery offenses require a heightened *mens rea* would appropriately construe the statute “strictly against the State and in favor of the defendant.” *See Blackmon*, 304 S.C. at 273–74, 403 S.E.2d at 662. Clemons’ interpretation of the statute, by contrast, would allow the State to prosecute reckless and negligent conduct that the State is not prosecuting as Assault and Battery.

A review of appeals involving statutory ABHAN and Assault and Battery convictions demonstrates the State uses the statute to prosecute intentional conduct. *See, e.g., Guderyon*, 2022 WL 17480097, at \*1 (punching the victim in the head); *Garren v. State*, 423 S.C. 1, 6, 813 S.E.2d 704, 707 (2018) (forcing pills down the victim’s throat and asking if she wanted to die; submerging her in a tub; tying her up and dragging her; and beating her with a number of household objects); *Carter v. Bryant*, 429 S.C. 298, 316, 838 S.E.2d 523, 533 (Ct. App. 2020), *reh’g denied* (Feb. 20, 2020), *cert. denied* (Oct. 19, 2020) (beating the victim with a baseball bat repeatedly); *State v. Hardin*, 425 S.C. 1, 5, 819 S.E.2d 177, 179 (Ct. App. 2018) (striking the victim in the back of the head with a gun).

Clemons argues that “[i]f 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.” Opening Br. at 14 (quotation marks and alteration omitted). But the same is true of the unlawful communication, kidnapping, and securities fraud statutes this Court analyzed in *Brown*, *Jefferies*, and *Sterling*—all of which omitted an express mental state, and all of which this Court found required heightened levels of intent. *See Brown*, 274 S.C. at 508, 266 S.E.2d at 65 (requiring “the intent and sole purpose of conveying an unsolicited obscene, imminently threatening and/or harassing message to an unwilling recipient”); *Jefferies*, 316 S.C. at 19, 446 S.E.2d at 430–31 (requiring knowledge); *Sterling*, 396

S.C. at 615, 723 S.E.2d at 185 (requiring “knowing misconduct or severe recklessness”). These cases illuminate the flaw in Clemons’ reasoning: the absence of an explicit mental state does not end the inquiry; it invites it.

Moreover, it is equally true that if the General Assembly intended that the statutory Assault and Battery crimes could be committed recklessly or negligently, it could have indicated so with clear language. For example, the legislature has explicitly proscribed reckless or negligent conduct with respect to involuntary manslaughter, which defines criminal negligence as “the reckless disregard for the safety of others,” S.C. Code Ann. § 16–3–60 (Supp. 2009); hazing, which prohibits both intentional and reckless conduct, S.C. Code Ann. § 16–3–510 (Supp. 2009); reckless homicide by operation of a boat, S.C. Code Ann. § 50–21–115 (Supp. 2009); and reckless vehicular homicide, S.C. Code Ann. § 56–5–2910 (Supp. 2009). All four statutes were in effect when the General Assembly abolished common-law assault and created the new Assault and Battery offenses. Yet it chose not to adopt the recklessness or negligence standards enumerated in those statutes.

Nonetheless, Clemons argues that even though the General Assembly abolished assault, it must have intended to incorporate common-law elements into the new crimes. Opening Br. at 15–16. But he has identified no case holding the common-law elements of assault offenses—including their required mental states—have been imported into the statutory Assault and Battery offenses.

Clemons relies on *State v. Bridgers*, Opening Br. at 16, where this Court explained that “[t]he General Assembly is presumed to be aware of the common law, 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.” 329 S.C. 11, 14, 495 S.E.2d 196, 197–98 (1997) (citation omitted). *Bridgers* gains him no ground for two reasons.

First, *Bridgers* is primarily concerned with terms, not elements. The Court looked to the common law for help interpreting the meaning of the words “public official” in a statute. But *Bridgers* does not allow courts to import *common-law elements* into *statutory offenses*. Contrary to Clemons’ suggestion, neither *Bridgers* nor any other of this Court’s cases offers a trap door whereby centuries of common-law principles may be so loosely imposed upon a newly created statutory scheme.

Indeed, in *State v. Hernandez* and *State v. King*, this Court expressly rejected attempts to impose old common-law standards on the new Assault and Battery offenses. *Hernandez* held the new statutory scheme foreclosed the appellant’s argument that ABHAN is a lesser-included offense of Criminal Sexual Conduct, notwithstanding common-law tradition. 428 S.C. 257, 259, 834 S.E.2d 462, 464 (2019) (per curiam). *King* held the new statutory crime of Attempted Murder was not a codification of the common-law offense of Assault and Battery with Intent to Kill (ABWIK), and the trial court erred by instructing the jury it could convict on a

common-law finding of implied malice. 422 S.C. at 62–64, 810 S.E.2d at 26–27 (noting the General Assembly had “expressly repealed the offense of ABWIK and purposefully created the new offense of attempted murder, which includes a ‘specific intent to kill’ as an element”). These cases holding common-law principles do not apply to the new statutory crimes honor the General Assembly’s intent to abolish the common-law assault offenses.

Second, this Court need not *presume* the General Assembly was “aware of the common law” when it passed the Act because the body acknowledged it was. And its expressed intention was to *abolish* that common law and replace it with a new statutory scheme. *See* 2010 S.C. Acts 273, Part I, § 7(B).

South Carolina recognized a host of common-law assault offenses, including ABWIK, Assault with Intent to Kill, ABHAN, Simple Assault and Battery, Assault of a High and Aggravated Nature, Aggravated Assault, and Simple Assault. These crimes no longer exist, and nothing in the text or legislative history of the new statutory scheme indicates the General Assembly intended to impose the elements or obligations of any one of these offenses onto the separate and distinct crimes the Omnibus Crime Reduction and Sentencing Reform Act created. Instead, the text and legislative history of the Assault and Battery statute establish that all four forms of Assault and Battery require intentional conduct.

### **III. Criminal Domestic Violence of a High and Aggravated Nature Can Only Be Committed by Intentional Conduct.**

As with Assault and Battery, the text and legislative history of the Criminal Domestic Violence statute establish that the General Assembly did not intend to criminalize recklessly or negligently caused injuries. South Carolina created the crime of Criminal Domestic Violence in 1984 when it passed the Criminal Domestic Violence Act. *See* 1984 S.C. Acts 484 (effective date June 22, 1984). The law made it unlawful to cause physical harm or injury to a household member, or offer or attempt to cause physical harm or injury to a household member “with apparent present ability under circumstances reasonably creating fear of imminent peril.” *Id.*, Section 1, § 16–25–20. A first offense was punishable by up to 30 days in prison and a \$200 fine. *Id.* § 16–25–30. A third offense was punishable by up to three years in prison and a \$3,000 fine. *Id.* § 16–25–40. The law gave courts authority to suspend the sentence upon the defendant’s participation in “a program designed to treat battering spouses” or other appropriate psychiatric or therapeutic treatment; fulfillment of the obligations of a protective order; or terms of probation deemed “necessary to ensure the protection of the victim.” *Id.* § 16–25–60.

The domestic violence statutory scheme has been amended several times since 1984. In 1994, the legislature created the crime of Criminal Domestic Violence of a High and Aggravated Nature (CDVHAN) and increased the penalties for domestic violence convictions and for violating an order of protection. *See* 1994 S.C. Acts

519 (effective date Sept. 23, 1994). In its original form, the CDVHAN statute provided:

- (A) The elements of the common law crime of assault and battery of a high and aggravated nature are incorporated in and made part of the offense of criminal domestic violence of a high and aggravated nature when a person violates the provisions of Section 16–25–20 and the elements of assault and battery of a high and aggravated nature are present.
- (B) A person who commits the crime of criminal domestic violence of a high and aggravated nature is guilty of a misdemeanor and, upon conviction, must be fined not more than three thousand dollars or imprisoned not more than ten years, or both.
- (C) The provisions of this section create a statutory offense of criminal domestic violence of a high and aggravated nature and must not be construed to codify the common law crime of assault and battery of a high and aggravated nature.

*Id.*, Section 1, § 16–25–65. From its inception, a CDVHAN conviction has required a violation of the CDV statute accompanied by aggravated circumstances.

The 1994 legislation allowed the court to suspend all or part of the sentence for CDVHAN and place the offender on probation conditioned upon “the participation of the offender, to the satisfaction of the court, in a program designed to treat battering spouses where available or in other appropriate psychiatric or therapeutic treatment or counseling;” fulfillment of the obligations of a protective

order; or terms of probation deemed “necessary to ensure the protection of the victim.”<sup>9</sup> *Id.*, Section 1, § 16–25–60(C).

In 2003, the General Assembly passed the Domestic Violence Prevention Act, which revised penalties for CDV offenses committed within ten years and created a comprehensive approach to addressing domestic violence involving law enforcement, state agencies, schools, and public-private partnerships. *See* 2003 S.C. Acts 92 (effective date Jan. 1, 2004). The CDVHAN statute was amended to provide:

- (A) A person who violates Section 16–25–20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs:
  - (1) the person intentionally commits an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or
  - (2) the person intentionally commits an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

---

<sup>9</sup> This provision is codified today at S.C. Code Ann. § 16–25–20(E) (Supp. 2021), which allows for suspension of a sentence conditioned upon (1) mandatory completion of “a domestic violence intervention program designed to treat batterers;” fulfillment of the obligations of any protective order; “reasonable terms and conditions of probation as the court may determine necessary to ensure the protection of the victim;” *and* “making restitution as the court deems appropriate.”

*Id.*, Section 3, § 16–25–65(A). Like the 1994 version of CDVHAN, the 2003 statute continued to base a CDVHAN conviction on a violation of the CDV statute accompanied by aggravating circumstances.

In 2005, the General Assembly increased penalties for CDV offenses again, particularly for recidivists. *See* 2005 S.C. Acts 166 (effective date Jan. 1, 2006). It also changed the CDVHAN statute by removing the intentionality requirement from the list of aggravating circumstances:

(A) A person who violates Section 16–25–20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits:

- (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or
- (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

*Id.*, Section 3, § 16–25–65(A). As in 1994 and 2003, the 2005 CDVHAN statute continued to require CDV plus aggravating circumstances.

In 2008, the General Assembly overhauled the penalty scheme for CDV offenses, again focusing on recidivists. *See* 2008 S.C. Acts 255 (effective date June 4, 2008).

Finally, in 2015, the General Assembly passed the Domestic Violence Reform Act, which graduated the CDV offenses into degrees and revised the penalty scheme. *See* 2015 S.C. Acts 58 (effective date June 4, 2015). The CDV statute now contains

three degrees of offenses. S.C. Code Ann. § 16–25–20 (Supp. 2021). All three include the same prefatory language, which is substantively identical to the CDV statute first passed in 1984:

(A) It is unlawful to:

- (1) cause physical harm or injury to a person’s own household member; or
- (2) 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.

S.C. Code Ann. § 16–25–20(A). The degrees are based primarily on the seriousness of the injury caused, offered, or attempted or the type of aggravating circumstances present. For example, First-Degree CDV is committed when “great bodily injury” results or was likely to result or one of a number of aggravating circumstances—like committing Second-Degree CDV while violating an order of protection—is present.

S.C. Code Ann. § 16–25–20(B).

The 2015 legislation also substantially changed the CDVHAN statute. 2015

S.C. Acts 58, Section 5, § 16–25–65. It now states:

(A) A person who violates Section 16–25–20(A) is guilty of the offense of domestic violence of a high and aggravated nature when one of the following occurs. The person:

- (1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;

- (2) commits 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) violates a protection order and, in the process of violating the order, commits domestic violence in the first degree.

S.C. Code Ann. § 16–25–65 (Supp. 2021). Like every iteration before it, CDVHAN still requires CDV plus aggravating circumstances. The parties therefore agree that the *mens rea* for CDVHAN turns on the *mens rea* for CDV. *See* Opening Br. at 18.

Clemons concedes the “offer or attempt to cause physical harm or injury” alternative in § 16–25–20(A)(2) requires specific intent to cause physical harm. *Id.* at 19. As noted above, specific intent “loosely corresponds with the more modern concept of ‘purpose,’” *Jefferies*, 316 S.C. at 19 n.9, 446 S.E.2d at 431 n.9, and it is the “highest possible mental state,” *King*, 422 S.C. at 56, 810 S.E.2d at 22. This alternative requires intentional conduct.

Assuming Clemons is correct that the “cause physical harm or injury” alternative in § 16–25–20(A)(1) is a separate offense, it also requires intent to harm. A review of the entire CDV statutory scheme demonstrates the General Assembly intended to abandon the elements of common-law assault and battery and criminalize intentionally injuring, offering to injure, and attempting to injure a household member.

The General Assembly criminalized CDV “to protect against harm and *violence* from members of an individual’s household.” *Arthurs v. Aiken Cty.*, 338 S.C. 253, 266, 525 S.E.2d 542, 549 (Ct. App. 1999) (emphasis added). In the same legislation, it passed the Protection from Domestic Abuse Act, which provided means of “protection from domestic *abuse*.” 1984 S.C. Acts 484, Section 2 (emphasis added); *Doe*, 421 S.C. at 505, 808 S.E.2d at 815 (explaining “the overall legislative purpose” of the Domestic Violence Reform Act and the Protection from Domestic Abuse Act “is to protect victims from domestic violence that occurs within the home and between members of the home”). In the domestic violence context, a victim “is considered abused if she has had *intentional*, usually repeated, physical or psychological harm done to her by [someone] with whom she is or has been in an intimate relationship.” 17 S.C. Jur. *Criminal Domestic Violence*, § 2 (Supp. 2023) (emphasis added).

As this Court recently acknowledged, “[i]n South Carolina, domestic violence occurs at rates far exceeding the national average[.]” *Baddourah v. McMaster*, 433 S.C. 89, 112, 856 S.E.2d 561, 573 (2021). One study cited by the Court indicated “41.5% of South Carolina women and 17.4% of South Carolina men experience physical or sexual violence and/or stalking by an intimate partner in their lifetimes.” *Id.* The General Assembly passed the CDV law—and amended it in 1994, 2003,

2005, 2008, and 2015 to increase penalties (particularly for recidivists)—“with the aim of curbing these alarming statistics.” *See id.* at 113, 856 S.E.2d at 574.

The General Assembly’s intent to target chronic, repeated, and intentional abuse is reflected in the remarks of members who supported the Domestic Violence Reform Act in 2015. One Senator recounted the abuse her sister faced at the hands of her husband for almost 30 years. S. Journal, 121st Leg. Sess. (S.C. Feb. 24, 2015). Another expressed dismay that South Carolina ranked at the top of the nation in criminal domestic violence cases against women, and he argued the bill would “hopefully decrease the number of cases of CDV in this State or make [offenders] think twice or either suffer harsher penalties if they decide to continue down this road.” S. Journal, 121st Leg. Sess. (S.C. Feb. 25, 2015).

In the General Assembly’s efforts to “expand domestic violence protections” and tackle a domestic-violence homicide rate consistently well above the national average, *see* Christina L. Myers, *South Carolina still near bottom in violence against women*, A.P. News (Feb. 11, 2019),<sup>10</sup> there is no evidence it intended to also criminalize conduct like injuring a spouse while recklessly driving or splattering grease on a spouse while recklessly cooking with her nearby. *See Baddourah*, 433 S.C. at 113, 856 S.E.2d at 574 (noting in parenthetical that ““where the assailant is

---

<sup>10</sup> <https://apnews.com/article/af9c4ee9c722496398f20d6e234d172e> (accessed Feb. 20, 2023).

in a special relationship with the victim, for which society rationally demands, and the victim may reasonably expect, stability and safety, and then commits a *willful act* upon the victim in violation of that relationship, it necessarily connotes the general readiness to do evil that has been held to define moral turpitude” (quoting *California v. Burton*, 243 Cal. App. 4th 129, 196 Cal. Rptr. 3d 392, 397 & n.8 (Ct. App. 2015)) (quotation marks omitted, emphasis added)).

Clemons argues it “would make little sense” for the General Assembly to impose a higher *mens rea* requirement than common-law battery “for an offense which is essentially battery of a household member.” Opening Br. at 20. But the text of the CDV statute shows CDV was not meant to be a codified version of common-law assault and battery focused on injury to a household member.

A common-law assault was “an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another,” and a common-law battery was “the successful accomplishment of such attempt.” *State v. Jones*, 133 S.C. 167, 130 S.E. 747, 751 (1925), *overruled on other grounds by State v. Foust*, 325 S.C. 12, 479 S.E.2d 50 (1996). Common-law assault and battery were still prosecutable offenses when CDV was created in 1984. *See United States v. Drummond*, 925 F.3d 681, 695 (4th Cir. 2019). Yet, as the Fourth Circuit Court of Appeals recognized, the CDV statute “does not borrow the language of common-

law assault” and battery offenses, *id.*, which Clemons argues could be committed recklessly, *see* Opening Br. at 19–20.

Instead of using the common-law elements—“violent injury,” “present ability,” and “person of another”—the General Assembly used different phrases: “physical harm or injury,” “apparent present ability under circumstances reasonably creating fear of imminent peril,” and “household member.” 1984 S.C. Acts 484, Section 1, § 16–25–20; S.C. Code Ann. § 16–25–20(A) (Supp. 2021). “Because the General Assembly is presumed to be aware of the common law, its deliberate use of a phrase not rooted in the common-law offense of assault indicates that the General Assembly did not intend the CDV statute to mirror the requirements of common-law assault.” *Drummond*, 925 F.3d at 695–96 (quotation marks, alteration, and citation omitted).

Other portions of the Code support the notion that the General Assembly did not intend to sweep up reckless or negligent conduct and disprove Clemons’ claim that the CDV statute was meant only to criminalize the injury to the victim, not the intent of the offender. *See* Opening Br. at 20. The legislature sought to do more than punish harm that had already occurred; it sought to prevent intentional harm from happening again.

For example, § 16–25–70, which addresses warrantless arrests and searches related to claims of domestic violence, lists factors for law enforcement officers to

consider in “determining whether a person is the primary aggressor” under the CDV and CDVHAN statutes. S.C. Code Ann. § 16–25–70(D) (Supp. 2021). Those factors are: (1) “prior complaints of domestic or family violence;” (2) “the relative severity of the injuries inflicted on each person taking into account injuries alleged which may not be easily visible at the time of the investigation;” (3) “the likelihood of future injury to each person;” (4) “whether one of the persons acted in self-defense;” and (5) “household member accounts regarding the history of domestic violence.” *Id.* Officers determining whether there is probable cause to arrest on a CDV charge are not looking for recklessly or negligently caused injuries; they are looking for signs of chronic, repeated, and intentional abuse that is likely to recur.

The Protection from Domestic Abuse Act, passed at the same time the General Assembly criminalized CDV in 1984, reflects the same goal. The law created a “Petition for an Order of Protection” to address “cases of abuse to a family or household member.” 1984 S.C. Acts 484, Section 2, § 20–4–40. It allowed courts to issue an order of protection to any petitioner who proves an allegation of abuse by a preponderance of the evidence, a standard that can be satisfied with a “prima facie showing of *immediate and present danger of bodily injury.*” *Id.*, Section 2, § 20–4–50(a) (emphasis added). Such an order can enjoin “the respondent from abusing, threatening to abuse, or molesting” the victim. *Id.*, Section 2, § 20–4–60(a)(1).

“The effect of the Act was to bring the parties before a judge as quickly as possible *to prevent further violence.*” *Moore v. Moore*, 376 S.C. 467, 476, 657 S.E.2d 743, 748 (2008) (quoting 17 S.C. Jur. *Criminal Domestic Violence*, § 14 (Supp. 2007)) (emphasis added). But no petitioner could show immediate and present danger of recklessly or negligently caused bodily injury, and because unintentional conduct is generally not foreseeable, it would make no sense for a court to order a respondent not to recklessly or negligently abuse, threaten to abuse, or molest a petitioner. This scheme makes sense only if the General Assembly was targeting *intentional* harm.

Moreover, the General Assembly’s repeated provision for reduced or suspended sentences after completion of domestic violence intervention programs designed to treat “batterers” indicates the statute was designed to punish those “who inflict[] violent physical abuse upon a child, spouse, or other person.” *See* “Batterer,” Dictionary.com.<sup>11</sup> And abuse means “*intentional*, usually repeated, physical or psychological harm[.]” 17 S.C. Jur. *Criminal Domestic Violence*, § 2 (2023 Supp.) (emphasis added). Individuals who injure a spouse or child while recklessly driving or recklessly moving through the home would not benefit from

---

<sup>11</sup> dictionary.com/browse/batterer (accessed Feb. 20, 2023).

domestic violence intervention programs. Nor would their conduct be punished as Criminal Domestic Violence.

A review of published cases involving South Carolina CDV and CDVHAN convictions shows the State prosecutes conduct that is decidedly not negligent or reckless, including:

- repeatedly slapping and punching the victim, constantly smacking her in the face, hitting her head, punching her arms, choking her, and throwing her to the floor, *State v. Workman*, 437 S.C. 62, 65–66, 876 S.E.2d 151, 152–53 (Ct. App. 2022);
- repeatedly striking the victim, swinging an ax at her head, and pointing a gun at her, *Garren*, 423 S.C. at 5, 813 S.E.2d at 707;
- attacking the victim using “fists, a log, and a hatchet” to the point that her face was so swollen her son did not recognize her and she could not open one of her eyes for ten days, *State v. Golston*, 399 S.C. 393, 395–96, 732 S.E.2d 175, 177 (Ct. App. 2012);
- shooting the victim, then dragging her by the arms to a secluded area of their yard and leaving her there, *State v. Senter*, 396 S.C. 547, 549–50, 722 S.E.2d 233, 234 (Ct. App. 2011);
- punching the victim, *In re Care and Treatment of Miller*, 385 S.C. 539, 541, 685 S.E.2d 619, 620 (Ct. App. 2009);
- smacking the victim in the face and head and punching her in the side of the stomach, *Rogers v. State*, 358 S.C. 266, 267–68, 594 S.E.2d 278, 278–79 (Ct. App. 2004);
- striking the victim in the face with a closed fist, hitting her in the head, pulling her hair, and scratching her neck, *State v. McLeod*, 354 S.C. 40, 42, 579 S.E.2d 534, 535 (Ct. App. 2003); and

- beating and kicking the victim, fracturing two of her ribs and causing her spleen to need to be removed, *State v. Wright*, 349 S.C. 310, 312, 563 S.E.2d 311, 312 (2002).

The State is prosecuting intentional abuse as CDV and CDVHAN.

Clemons asserts that the 2005 and 2015 amendments to CDVHAN’s list of aggravating circumstances show the legislature intended to incorporate common-law assault and battery mental states into the statute. *See* Opening Br. at 23–25. There are two primary elements of CDVHAN: (1) a violation of the CDV statute; and (2) the presence of an aggravating circumstance. *Golston*, 399 S.C. at 397, 732 S.E.2d at 178. “It is commonplace that ‘different elements of the same offense can require different mental states,’” *Miles*, 421 S.C. at 161, 805 S.E.2d at 208 (quoting *Staples v. United States*, 511 U.S. 600, 609 (1994)), and the Court should reject Clemons’ invitation to overlay the *mens rea* requirements for the aggravating circumstances element onto the distinct CDV element.

Every iteration of CDVHAN has required CDV plus aggravating circumstances. But those aggravating circumstances—and their mental state requirements—have changed several times. For example, in 1994, CDVHAN required CDV plus the elements of common-law ABHAN. 1994 S.C. Acts 519, Section 1, § 16–25–65(A). The elements of common-law ABHAN were “the unlawful act of violent injury to another” and “circumstances of aggravation,” which included the use of a deadly weapon, intent to commit a felony, infliction of serious

bodily injury, great disparity in ages or physical conditions of the parties, difference in gender, purposeful infliction of shame and disgrace, taking indecent liberties or familiarities with a female, and resistance to lawful authority. *Wright*, 349 S.C. at 312 n.1, 563 S.E.2d at 312 n.1. Some of those circumstances had enumerated mental states, like “intent” or “purpose,” but most did not. *See id.*

In 2003, the aggravating circumstances were changed, and the new alternatives required intentionality. 2003 S.C. Acts 92, Section 3, § 16–25–65(A). In 2005, the intentionality requirement was removed. 2005 S.C. Acts 166, Section 3, § 16–25–65(A).

In 2015, the aggravating circumstances changed again. 2015 S.C. Acts 58, Section 5, § 16–25–65(A). The list in place today contains “commit[ting] the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;” “commit[ting] 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 “violat[ing] a protection order and, in the process of violating the order, commit[ting] domestic violence in the first degree.” S.C. Code Ann. § 16–25–65(A).

Across all of these amendments to the aggravating circumstances, the operative language of the CDV statute has remained the same. Clemons does not

suggest that CDV's *mens rea* changed every time the list of aggravating circumstances changed, or that CDV's *mens rea* depends on which particular aggravating circumstance is present. In fact, he concedes just the opposite, asserting that CDVHAN's *mens rea* turns on CDV's *mens rea*. See Opening Br. at 18. Put simply, the mental state requirement for the aggravating circumstances element has no impact on the mental state requirement for the CDV element.

Whether intent is a necessary element of CDVHAN “must be determined from the language of the statute construed in light of its purpose and design.” *Bryant*, 316 S.C. at 218, 447 S.E.2d at 854. The General Assembly abandoned the common-law definitions of assault and battery and enacted a statutory scheme focused on protecting victims of domestic violence from intentional abuse. Clemons’ claim that CDVHAN criminalizes reckless and negligent behavior is at odds with the legislative history of the statute, the manner in which the State is prosecuting CDV and CDVHAN, and this Court’s mandate that penal statutes be construed “strictly against the State and in favor of the defendant,” see *Blackmon*, 304 S.C. at 273–74, 403 S.E.2d at 662. CDVHAN’s text, purpose, and design all establish that it criminalizes only intentional conduct.

### **CONCLUSION**

When the General Assembly passed the Omnibus Crime Reduction and Sentencing Reform Act, it sought to ensure that prison space was reserved for violent

offenders and that high-risk, violent offenders served significant sentences. When it passed the Criminal Domestic Violence Act, and amended that Act in 1994, 2003, 2005, 2008, and 2015, it aimed to curb statistics reflecting that South Carolinians have long suffered from the highest rates of domestic violence in the country. In both circumstances, the General Assembly legislated against a common law that included a host of assault and battery offenses, some of which could be committed recklessly. And in both circumstances, the General Assembly rejected those common-law offenses and created new crimes. The text, purpose, and design of the Assault and Battery and Criminal Domestic Violence statutes establish that both criminalize only intentional conduct.

Respectfully submitted,

ADAIR F. BOROUGHS  
UNITED STATES ATTORNEY

*/s/Kathleen Michelle Stoughton*  
Kathleen Michelle Stoughton (#12161)  
Assistant United States Attorney  
1441 Main Street, Suite 500  
Columbia, South Carolina 29201  
Tel. (803) 929-3114  
Fax (803) 929-3135  
Email: [Kathleen.Stoughton@USDOJ.GOV](mailto:Kathleen.Stoughton@USDOJ.GOV)

February 22, 2023