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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Certification from the United States Court of Appeals for the Fourth Circuit
Appellate Case No. 2022-001378

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PATRICK FITZGERALD CLEMONS,

Defendant.

BRIEF OF AMICUS CURIAE STATE OF SOUTH CAROLINA

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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

Through an order filed on October 3, 2022, the United States Court of Appeals for the Fourth Circuit submitted two certified questions to this Court pursuant to the procedure set out in Rule 244 of the South Carolina Appellate Court Rules. In doing so, the Court of Appeals explained the submitted questions' answers would be determinative of a pending appeal initiated by Patrick Fitzgerald Clemons after he was convicted of and sentenced for being a felon in possession of a firearm in the United States District Court for the District of South Carolina. On October 26, 2022, this Court issued an order stating it would answer the submitted questions. Following that, Clemons and the United States of America filed their briefs. On May 16, 2023, this Court conducted an oral argument in the matter. Thereafter, on May 22, 2023, this Court invited and encouraged the South Carolina Attorney General's Office to file an amicus brief on behalf of the State of South Carolina. The Attorney General's Office has now accepted this Court's invitation.

STANDARD OF REVIEW

When answering a certified question, the applicable standard of review is dependent 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, [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." Id. (citation, internal quotations, and brackets omitted).

Meanwhile, in State v. Taylor, 436 S.C. 28, 34, 70 S.E.2d 168, 171 (2022), this Court recently provided a thorough explanation of the standard of review and governing principles that control a South Carolina appellate court's analysis of a question of statutory interpretation. Specifically, this Court instructed:

> A question of statutory interpretation is a question of law, which is subject to de novo review and which we are free to decide without deference to the courts below. Where a statute's language is plain, unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed, and the Court has no right to impose another meaning. However, if a statute is ambiguous, the Court must construe its terms.
>
> The primary rule of statutory construction is to ascertain and effectuate the intent of the legislature. A statute's language must be construed in light of its intended purpose, and whenever possible, legislative intent should be found in the plain language of the statute itself. The Court should give words their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. A statute's language should be read in a sense which harmonizes with its subject matter and accords with its general purpose. A court should not focus on any single section or provision but should consider the language of the statute as a whole. The Court must reject a statutory interpretation if it leads to an absurd result that could not possibly have been intended by the legislature or that defeats plain legislative intent.

Id. (citations, internal quotations, and brackets omitted).

ARGUMENT

The mental state required to commit either second-degree assault and battery or domestic violence of a high and aggravated nature in South Carolina depends on the nature of the allegations involved, and the statutory elements of those two offenses do not categorically preclude conviction based on the mental state of recklessness under all circumstances.

With the passage of the Omnibus Crime Reduction and Sentencing Reform Act in 2010, the South Carolina General Assembly replaced our state's historic assault and battery offenses with new statutory offenses of escalating degree. Meanwhile, with the passage of the Domestic Violence Reform Act in 2015, the legislature enacted reworked versions of our state's domestic violence offenses.

The matter currently before this Court seeks answers concerning what mental states are required to prove two of those new and reworked offenses—second-degree assault and battery pursuant to Section 16-3-600(D) of the South Carolina Code of Laws and domestic violence of a high and aggravated nature pursuant to Section 16-25-65(A). And, to provide such answers, this Court must interpret statutory language applicable not just to those two offenses but to all South Carolina's statutory assault and battery and domestic violence crimes.

When given its plain and ordinary meaning, the pertinent statutory language supports a conclusion the mental state necessary to prove any of the assault and battery offenses hinges on whether the charged offense is based on an allegation the defendant "unlawfully injure[d]" another or "offer[ed] or attempt[ed]" to injure another. Likewise, with our reworked domestic violence offenses, the requisite mental state hinges on whether the charged offense is based on an allegation the defendant "cause[d] physical harm or injury" to a household member or "offer[ed] or attempt[ed]" to do so.

As will be explained in greater detail, the State believes the "attempt" statutory language present in Section 16-3-600 and Section 16-25-20—which is applicable to Section 16-25-65—necessitates the offender possess a mental state of specific intent while the "offer" language may necessitate the offender possess such a mental state. Conversely, the State believes both the distinct "unlawfully injures" language from Section 16-3-600 and the "cause physical harm or injury" language from Section 16-25-20 allow for conviction when the offender acts intentionally or purposefully, knowingly, or recklessly.

Accordingly, the State asks this Court to answer the certified questions before it in two ways. First, it should find the mental state required to commit either second-degree assault and battery or domestic violence of a high and aggravated nature depends on the nature of the allegations involved. Second, it should find the statutory elements of second-degree assault and battery and domestic violence of a high and aggravated nature do not categorically preclude conviction based on the mental state of recklessness under all circumstances.[1]

A. The statutory language employed in Sections 16-3-600, 16-25-20, and 16-25-65 allows for conviction based on differing mental states, including recklessness in some instances, depending on the nature of the allegations involved.

With the enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010, various statutory assault and battery offenses—including the misdemeanor offense of

[1] Because that answer would appear to be dispositive for the purposes that led to the certified questions being submitted, this Court need not now *also* answer the question of whether a mental state of criminal negligence could support a conviction for second-degree assault and battery or domestic violence of a high and aggravated nature in South Carolina. See Borden v. United States, __ U.S. __, 141 S. Ct. 1817, 1821-1822 (2021) (plurality opinion) ("The question here is whether a criminal offense can count as a 'violent felony' [under the federal Armed Career Criminal Act] if it requires only a mens rea of recklessness—a less culpable mental state than purpose or knowledge. We hold that a reckless offense cannot so qualify."); cf. Sangamo Weston, Inc. v. Nat'l Sur. Corp., 307 S.C. 143, 148, 414 S.E.2d 127, 130 (1992) ("In order for this court to consider adopting § 193 of the Restatement, the facts advocating its adoption in a particular case must be sufficiently developed. This court will not issue advisory opinions and cannot alter precedent based on questions presented in the abstract.").

second-degree assault and battery—were created. Act No. 273, 2010 S.C. Acts & Joint Resolutions; State v. Hernandez, 428 S.C. 257, 260, 834 S.E.2d 462, 463 (2019). Second-degree assault and battery is statutorily defined as follows:

> 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) (emphasis added). Thus, like most of South Carolina's other statutory assault and battery offenses, second-degree assault and battery can be committed either by "unlawfully injur[ing]" another or by "offer[ing] or attempt[ing] to" do so. Id. Furthermore, under some methods by which that offense can be committed, it is distinguishable from both greater and lesser assault and battery offenses primarily—and sometimes exclusively—based on the level of bodily injury that "results." Id.; see S.C. Code Ann. § 16-3-600(B)(1) (setting out the offense of assault and battery of a high and aggravated nature, which occurs when a person unlawfully injures another and 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(E)(1) (setting out the offense of third-degree assault and battery, which occurs when a person either unlawfully injures another or offers or attempts to injure another with the present ability to do so); see also Collins English Dictionary 1697 (13th ed. 2018) (defining "result" as "to be the outcome or consequence (of)").

Meanwhile, the Domestic Violence Reform Act of 2015 reworked South Carolina's domestic violence offenses, including domestic violence of a high and aggravated nature. Act No. 58, 2015 S.C. Acts & Joint Resolutions. In its most basic form, domestic violence is committed when a person "cause[s] physical harm or injury" to a household member or "offer[s] or attempt[s]" to do so "with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A). Domestic violence of a high and aggravated nature is—as its name suggests—an aggravated form of domestic violence in general, and it can be committed in a variety of ways. S.C. Code Ann. § 16-25-65(A). Included amongst those ways, a person is guilty of domestic violence of a high and aggravated nature when the person causes physical harm or injury to a household member "under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results[.]" S.C. Code Ann. § 16-25-65(A)(1). For purposes of the offense, statutorily-defined "circumstances manifesting extreme indifference" include "committing the offense in the presence of a minor" and "knowingly and intentionally impeding the normal breathing or circulation of the blood of a household member by applying pressure to the throat or neck or by obstructing the nose or mouth of a household member and thereby causing stupor or loss of consciousness for any period of time[.]" S.C. Code Ann. § 16-25-65(D).

Giving the language of those statutory provisions its plain and ordinary meaning as required, the mental state required to commit either second-degree assault and battery or domestic violence of a high and aggravated nature is dependent on the nature of the allegations involved. Specifically, when one of those offenses is committed by "attempt[ing]" to injure or cause harm, the State must establish a mental state of specific intent for conviction due to the nature of an attempt, and it is difficult to imagine how "offer[ing]" to injure or cause harm could

be accomplished without a similar mental state. See State v. Reid, 393 S.C. 325, 329, 713 S.E.2d 274, 276 (2011) ("To prove attempt, the State must prove that the defendant had the *specific intent* to commit the underlying offense, along with some *overt act*, beyond mere preparation, in furtherance of the intent."); see also United States v. Mack, 56 F.4th 303, 307 (4th Cir. 2022) ("It is hard to imagine how a person could 'recklessly offer' . . . to do something."). Contrastingly, when one of those offenses is committed by "unlawfully injur[ing]" another or "caus[ing] physical harm or injury" to a household member, the State could validly obtain a conviction by establishing a purposeful, knowing, or reckless mental state due to the meaning of the words employed by the legislature coupled with the fact the legislature elected *not* to include a specific—and more-restrictive—mental state requirement with that language.[2] See Black's Law Dictionary 251 (9th ed. 2009) (defining "cause" as "[t]o bring about or effect"); Collins English Dictionary 1004 (13th ed. 2018) (defining "injure" as "to cause physical or mental harm or suffering to; hurt or wound" or "to offend, esp by an injustice"); cf. Voisine v. United States, 579 U.S. 686, 698-699 (2016) (concluding, when "naturally read," the phrase " 'use . . . of physical force' . . . encompasses acts of force undertaken recklessly—i.e., with conscious disregard of a

[2] Notably, in the domestic violence of a high and aggravated nature statute, the legislature *did* include a requirement for a more specific mental state in certain portions when it intended for such a requirement to be applicable. See S.C. Code Ann. § 16-25-65(D)(2) (identifying the following as a circumstance manifesting extreme indifference to human life for purposes of domestic violence of a high and aggravated nature: "*knowingly* and *intentionally* impeding the normal breathing or circulation of the blood of a household member . . ." (emphasis added)); Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) ("The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.' "); cf. Nelson v. Ozmint, 390 S.C. 432, 436, 702 S.E.2d 369, 371 (2010) (finding the legislature's inclusion of language allowing for early release in one statute but omitting it in another evidenced the legislature's intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for early release).

substantial risk of harm.");[3] Jones v. United States, 36 F.4th 974, 986 (9th Cir. 2022) (instructing the federal crime of assault resulting in serious bodily injury "can be committed recklessly" and noting the government conceded that point); United States v. Eagle, 586 F.2d 1193, 1196 (8th Cir. 1978) (explaining a federal statute criminalizing "[a]ssault resulting in serious body injury" did not require proof of specific intent and, instead, "require[d] only that the assault shall have resulted in serious bodily harm; the assault need not have been committed with a dangerous weapon, *or with intent to do bodily harm*" (emphasis added)).

Importantly, such a construction of our state's assault and battery and domestic violence offenses would be consistent with South Carolina's long history of criminalizing volitional acts causing death or injury regardless of whether those acts were committed in a purposeful, knowing, reckless, or criminally-negligent manner. See State v. Mouzon, 231 S.C. 655, 662, 99 S.E.2d 672, 675 (1957) (concluding evidence establishing Mouzon struck and killed a pedestrian while intoxicated and driving a vehicle at a speed of seventy to eighty miles per hour in an area with a posted speed limit of thirty-five miles per hour supported a conviction for murder); State v. Sussewell, 149 S.C. 128, __, 146 S.E. 697, 703 (1929) (affirming Sussewell's common law assault and battery of a high and aggravated nature conviction after concluding his act of striking a pedestrian with his car while driving at a "rapid rate of speed" could support findings of gross negligence, recklessness, or willfulness and could not support a conclusion he was only guilty of simple assault and battery); see also State v. Ferguson, 302 S.C. 269, 272, 395 S.E.2d 182, 183 (1990) (recognizing the following mental states may be sufficient to prove a crime in South Carolina depending on the particular offense involved: (1) purpose or intent; (2) knowledge; (3)

[3] For what it's worth, the term "battery" has been defined for criminal law purposes as "[t]he *use of force* against another, resulting in harmful or offensive contact." Black's Law Dictionary 173 (9th ed. 2009) (emphasis added).

recklessness; and (4) criminal negligence); William Shepard McAninch et al., The Criminal Law of South Carolina 212 (5th ed. 2007) (expressing the view there is no reason why both simple battery and aggravated battery should not be capable of being committed via criminal negligence in South Carolina and explaining that "appears to be the rule in the majority of jurisdictions"); William Shepard McAninch et al., The Criminal Law of South Carolina 243 (6th ed. 2013) (expressing the same view for the same reasons *after* the enactment of the Omnibus Crime Reduction and Sentencing Reform Act of 2010); cf. S.C. Code Ann. § 16-3-60 ("With regard to the crime of involuntary manslaughter, criminal negligence is defined as the reckless disregard of the safety of others."); S.C. Code Ann. § 16-3-95 (recognizing the felony offense of infliction of great bodily injury upon a child, which is defined simply as "inflict[ing] great bodily injury upon a child," can be committed in certain circumstances through a "reckless disregard for the safety of others"). Likewise, it would ensure South Carolina's assault and battery and domestic violence jurisprudence—and prosecutorial authority—would remain consistent with that of most other jurisdictions. See Voisine, 579 U.S. at 695 ("Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm. That agreement was not coincidence. Several decades earlier, the Model Penal Code had taken the position that a mens rea of recklessness should generally suffice to establish criminal liability, including for assault." (citations omitted)); see also State v. Guderyon, 438 S.C. 476, 494, 884 S.E.2d 202, 211 (Ct. App. 2022) (citing to a legal encyclopedia for the principle "battery is a general intent crime, and thus the required mental state entails only an intent to do the act that causes the harm" (internal quotations omitted)); Model Penal Code § 2.02(3) ("When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts

purposely, knowingly or recklessly with respect thereto.").[4] Furthermore, it would avoid an absurd result in which reckless conduct would be broadly treated as criminal in South Carolina if it resulted in death but would inconsistently not be treated so under most circumstances if it resulted only in an injury—including a grievous one—falling short of death. See Wade v. State, 348 S.C. 255, 259, 559 S.E.2d 843, 845 (2002) ("[A] court must reject a statute's interpretation leading to absurd results not intended by the Legislature.").

For those reasons and as a matter of sound public policy, the State believes this Court should find the mental state required to commit either second-degree assault and battery or domestic violence of a high and aggravated nature depends on the nature of the allegations involved. Further, it should find the statutory elements of second-degree assault and battery and domestic violence of a high and aggravated nature do not categorically preclude conviction based on the mental state of recklessness under all circumstances.

B. Hypothetical scenarios similar to the one articulated by the United States Supreme Court in Voisine v. United States illustrate how both second-degree assault and battery and domestic violence of a high and aggravated nature can be committed in South Carolina with a mental state of recklessness.

In Voisine v. United States, 579 U.S. 686, 688 (2016), the United States Supreme Court analyzed the question of whether a prior conviction for domestic violence based on reckless—as opposed to intentional or knowing—conduct involved a "use" of physical force as necessary to trigger a federal statutory firearms ban. In concluding the word "use" did not exclude reckless

[4] In the past, South Carolina appellate courts have looked to the Model Penal Code to aid in interpreting our state's criminal statutes. See, e.g., State v. Mitchell, 382 S.C. 1, 7, 675 S.E.2d 435, 438 (2009) (looking—in a decision issued prior to the passage of both the Omnibus Crime Reduction and Sentencing Reform Act of 2010 and the Domestic Violence Reform Act of 2015—to the Model Penal Code and legal treatises when determining whether the "continuous offense theory" was applicable to a violation of South Carolina's armed robbery statute).

conduct, the majority provided the following example illustrating the ordinary meaning of the word "use" and its embrace of an act of force committed recklessly:

> If a person with soapy hands loses his grip on a plate, which then shatters and cuts his wife, the person has not "used" physical force in common parlance. But now suppose a person throws a plate in anger against the wall near where his wife is standing. That hurl counts as a "use" of force even if the husband did not know for certain (or have as an object), but only recognized a substantial risk, that a shard from the plate would ricochet and injure his wife.

Id. at 693 (brackets omitted).

Similar to the hypothetical facts identified in Voisine, consider the following scenario. Person A in South Carolina is engaged in a heated argument with Person B, who is standing next to him. In a rage, Person A purposely throws a porcelain plate at a wall in the opposite direction of where Person B is standing. As could be expected from such an act, the plate shatters, sending shards of porcelain in various directions. Some of the shards strike Person B, injuring and causing physical harm to her. Person A did not intend to injure or cause harm to Person B when he committed the volitional act of throwing the plate, and, due to the fact he threw the plate in the opposite direction from Person B coupled with the unpredictability of how a porcelain plate might shatter, he did not know injury or physical harm to Person B was practically certain to follow from his act. Nonetheless, in his anger, Person A chose to consciously disregard the substantial risk of harm such an act created, and his act did ultimately injure and cause physical harm to Person B. In the State's view, Person A could properly be prosecuted for and convicted of third-degree assault and battery pursuant to Section 16-3-600(E) because he "unlawfully injure[d]" another through an intentional act committed with the criminally-culpable mental state of recklessness. And, the State cannot conceive of any sound public policy reasons why our legislature would have intended for such conduct to be immune from all criminal liability if

either purpose or knowledge was lacking, which is most likely why—as previously mentioned—a majority of jurisdictions appear to permit assault and battery prosecutions for such reckless behavior.

Meanwhile, consider another scenario with the only revision from the original being to the nature of the injury caused by Person A's act. After Person A throws the plate, Person B sustains from the flying shards a severe cut to her face requiring sutures and future reconstructive surgery to correct disfiguring scarring. Under that scenario, the State believes Person A could legitimately be prosecuted for and convicted of second-degree assault and battery pursuant to Section 16-3-600(D) because—again—Person A "unlawfully injure[d]" another through an intentional act committed with the criminally-culpable mental state of recklessness and—in the revised scenario—moderate bodily injury "result[ed]." See S.C. Code Ann. § 16-3-600(A)(2) (" 'Moderate bodily injury' means physical injury that involves prolonged loss of consciousness, or that causes temporary or moderate disfigurement or temporary loss of the function of a bodily member or organ, or injury that requires medical treatment when the treatment requires the use of regional or general anesthesia or injury that results in a fracture or dislocation. Moderate bodily injury does not include one-time treatment and subsequent observation of scratches, cuts, abrasions, bruises, burns, splinters, or any other minor injuries that do not ordinarily require extensive medical care."). And, since the distinguishing factor between what constitutes the misdemeanor offenses of second-degree and third-degree assault and battery under the version of events involved in this scenario is—based on the statutory language employed—merely the degree of injury that "results," it would appear incongruous for our legislature to have intended for an offender to be guilty of the lesser offense of third-degree assault and battery for an intentional act committed with the criminally-culpable mental state of recklessness that resulted

in injury to another but not guilty of the greater offense of second-degree assault and battery when the same intentional act was committed with the same mental state but a more significant injury to the victim resulted.

Now take the above-referenced scenarios and alter the facts slightly yet again. In one more scenario, Person A still undertakes the same act by intentionally throwing the plate out of anger but Person B, who is struck by a porcelain shard, is a household member pursuant to South Carolina law. In yet another scenario, those same events occur, but Person A and B's child is present in the room during the heated argument and the shards from the plate strike Person B in the eye, permanently blinding her. In the State's view, the logic applicable in the context of the statutory assault and battery offenses remains the same in the context of South Carolina's domestic violence offenses. In the first slightly-altered scenario, Person A—through a volitional act committed without an express purpose to injure but with a conscious disregard of the risk being created—"cause[d] physical harm or injury to [his] own household member." Since Person A caused physical harm or injury to a household member while engaging in a volitional act with the criminally-culpable mental state of recklessness, the plain language of Section 16-25-20 would permit Person A to be prosecuted for and convicted of one of the degrees of domestic violence depending on what other facts are involved. Likewise, in the second of those scenarios, the State believes Person A could properly be prosecuted for and convicted of domestic violence of a high and aggravated nature pursuant to Section 16-25-65 because: (1) he engaged in an intentional act with the criminally-culpable mental state of recklessness by consciously disregarding the risk of harm he was creating to a household member; (2) that act "cause[d] physical harm or injury" to his household member; (3) the offense occurred under what is statutorily defined as "circumstances manifesting extreme indifference" because it was

committed "in the presence of a minor;" and (4) "great bodily injury to the victim result[ed]" by her being permanently blinded as a result of Person A's act. See S.C. Code Ann. § 16-25-10(2) (" 'Great bodily injury' means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.").

Significantly, the citizens of South Carolina have a strong interest for the wrongful reckless behavior—and resulting harm—involved in those realistic scenarios to be discouraged through the prospect of criminal prosecution. And, that appears to be precisely why our legislature employed the non-restrictive language it employed in the relevant portions of the assault and battery and domestic violence statutes while at the same time employing specificity when it intended for a purposeful or knowing mental state to be required. See, e.g., S.C. Code Ann. § 16-25-65(D)(2) (identifying the following as a circumstance manifesting extreme indifference to human life for purposes of domestic violence of a high and aggravated nature: "knowingly and intentionally impeding the normal breathing or circulation of the blood of a household member . . ."). Accordingly, based on the plain language of the pertinent statutes and as a matter of sound public policy, the State asks this Court to find: (1) the mental state required to commit either second-degree assault and battery pursuant to Section 16-3-600(D) or domestic violence of a high and aggravated nature pursuant to Section 16-25-65(A) depends on the nature of the allegations involved; and (2) the statutory elements of second-degree assault and battery and domestic violence of a high and aggravated nature do not categorically preclude conviction based on the mental state of recklessness under all circumstances.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted the certified questions be answered by finding: (1) the mental state required to commit either second-degree assault and battery pursuant to Section 16-3-600(D) or domestic violence of a high and aggravated nature pursuant to Section 16-25-65(A) depends on the nature of the allegations involved; and (2) the statutory elements of second-degree assault and battery and domestic violence of a high and aggravated nature do not categorically preclude conviction based on the mental state of recklessness under all circumstances.

Respectfully submitted,

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June 26, 2023