STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Beaufort County
Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2016-000612

THE STATE,

Respondent,

vs.

BENJAMIN CERVANTES HERNANDEZ,

Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING

On August 1, 2018, this Court issued an unpublished opinion in which it unanimously affirmed Appellant Benjamin Cervantes Hernandez's conviction for second-degree criminal sexual conduct with a minor. State v. Hernandez, Op. No. 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). In affirming Hernandez's conviction, this Court correctly concluded the trial judge committed no error by finding first-degree and second-degree assault and battery were not lesser-included offenses of the indicted offense of second-degree criminal sexual conduct with a minor. Pursuant to Rule 221(a), SCACR, both the State and Hernandez petitioned this Court for rehearing for vastly different reasons, and this Court—after asking Hernandez to file a return to the State's petition—asked the State to file a return to Hernandez's petition. For the following reasons, Hernandez's petition should be denied.

Initially, as this Court noted in its opinion in Hernandez's case, an offense is typically only considered to be a lesser-included offense of a greater offense in South Carolina if the

greater offense includes all the elements of the lesser-included offense. State v. Primus, 349 S.C. 576, 579-580, 564 S.E.2d 103, 105 (2002), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005); see State v. Elliott, 346 S.C. 603, 606, 552 S.E.2d 727, 728 (2001) ("The test for determining when an offense is a lesser included offense of another is whether the greater of the two offenses includes all the elements of the lesser offense."). Applying that test to the offenses at issue in Hernandez's case, first-degree and second-degree assault and battery are not lesser-included offenses of second-degree criminal sexual conduct with a minor because second-degree criminal sexual conduct with a minor simply does not necessarily include all the elements of either of those assault and battery offenses. Compare S.C. Code Ann. § 16-3-655(B) (defining the offense of second-degree criminal sexual conduct with a minor, which requires proof: (1) the actor engaged in a sexual battery with a victim who was between eleven and fourteen years old; or (2) the actor engaged in a sexual battery with a victim who was at least fourteen years old but less than sixteen years old and the actor was in a "position of familial, custodial, or official authority to coerce the victim to submit" or was older than the victim); and S.C. Code Ann. § 16-3-651 (defining sexual battery for purposes of criminal sexual conduct offenses as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except where such intrusion is accomplished for medically recognized treatment or diagnostic purposes"); with S.C. Code Ann. § 16-3-600(C)(1) (defining the offense of first-degree assault and battery, which requires proof: (1) the actor injured another through nonconsensual touching of the private parts with lewd and lascivious intent or during the course of a robbery, burglary, kidnapping, or theft; or (2) the actor offered or attempted to injure another person with the present ability to do so by a means likely to produce

death or great bodily injury or during the commission of a robbery, burglary, kidnapping, or theft); and S.C. Code Ann. § 16-3-600(D)(1) (defining the offense of second-degree assault and battery, which requires proof the actor injured another person or offered or attempted to injure another person with the present ability to do so and: (1) moderate bodily injury resulted or could have resulted; or (2) the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing). As a result, first-degree and second-degree assault and battery are not—just as this Court correctly found—lesser-included offenses of second-degree criminal sexual conduct with a minor under the recognized and accepted test for determining whether a statutory offense is a lesser-included offense of another. See Knox v. State, 340 S.C. 81, 85, 530 S.E.2d 887, 889 (2000) ("A lesser offense is included in the greater only if each of its elements is *always* a necessary element of the greater offense."), overruled on other grounds by State v. Gentry, 563 S.C. 93, 610 S.E.2d 494 (2005).

In arguing to the contrary in his petition for rehearing, Hernandez makes no argument first-degree and second-degree assault and battery constitute lesser-included offenses of second-degree criminal sexual conduct with a minor pursuant to the elements test. Moreover, Hernandez acknowledges the legislature did *not* indicate the new statutory assault and battery offenses should be treated as lesser-included offenses of any criminal sexual conduct offenses when it enacted those offenses. Nonetheless, relying on the fact the common law—and now expressly abolished—offense of assault and battery of a high and aggravated nature had previously been treated by courts in South Carolina as a lesser-included offense of criminal sexual conduct offenses, Hernandez maintains the legislature must have intended for the new statutory assault and battery offenses it enacted to be treated similarly despite the fact it did nothing to suggest so because the legislature was presumed to be aware of the prior appellate court rulings regarding

common law assault and battery of a high and aggravated nature as a lesser-included offense. See Act No. 273, § 7, 2010 S.C. Acts & Joint Resolutions ("The common law offenses of assault and battery with intent to kill, assault with intent to kill, assault and battery of a high and aggravated nature, simple assault and battery, assault of a high and aggravated nature, aggravated assault, and simple assault are abolished for offenses occurring on or after the effective date of this act."); see also State v. Middleton, 407 S.C. 312, 315, 755 S.E.2d 432, 434 (2014) ("Though the passage of the Act, the legislature abolished all common law assault and battery offenses and all prior statutory assault and battery offenses.").

However, in enacting the new statutory offenses and abolishing the old common law offenses, the legislature in South Carolina specifically identified the different offenses to which the new statutory assault and battery offenses could be considered to be lesser-included offenses and elected *not* to recognize first-degree assault and battery, second-degree assault and battery, or any of the other new statutory assault and battery offenses as lesser-included offenses of any criminal sexual conduct offenses, including second-degree criminal sexual conduct with a minor. See S.C. Code Ann. § 16-3-600(C)(3) ("Assault and battery in the first degree is a lesser-included offense of assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Section 16-3-29."); S.C. Code Ann. § 16-3-600(D)(3) ("Assault and battery in the second-degree is a lesser-included offense of assault and battery in the first degree, as defined in subsection (C)(1), assault and battery of a high and aggravated nature, as defined in subsection (B)(1), and attempted murder, as defined in Sections 16-3-29."). In doing so, the legislature was presumed to be aware of the basic rules of statutory construction and, thus, was fully aware its inclusion of some offenses as lesser-included offenses would be interpreted to exclude other unidentified offenses as lesser-included offenses. See

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.' "); see also State v. King, 412 S.C. 403, 409, 772 S.E.2d 189, 192 (Ct. App. 2015) ("The Legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past."), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017); 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 intent for a defendant convicted of the offense delineated in the statute not containing the early release language to be ineligible for early release). Thus, by abolishing the common law offense of assault and battery of a high and aggravated nature and by enacting the new statutory assault and battery offenses with the express language it chose to employ, the General Assembly took the advice of our Supreme Court and provided the new statutory assault and battery offenses *not* be treated as lesser-included offense of criminal sexual conduct offenses.[1] See Elliott, 346 S.C. at 607, n. 2, 552 S.E.2d at 729 ("[T]he legislature, in enacting the CSC statutes, is presumed to know the common law *and could have provided that ABHAN not be treated as a lesser offense* of ACSC, as it was of AIR." (emphasis added)).

Additionally, in seeking rehearing, Hernandez maintains the "very language" employed by the legislature in the statutory assault and battery offenses demonstrates the legislature's intention for those offenses to be lesser-included offenses of criminal sexual conduct with a minor since language such as "private parts" and "lewd and lascivious intent" was included in

[1] Perhaps tellingly, Hernandez makes no reference to the "inclusio unius est exclusio alterius" canon of statutory construction or to the fact common law assault and battery of a high and aggravated nature was expressly abolished at any point in his petition for rehearing. (Pet. for Reh. pp. 1-9).

the statute defining first-degree and second-degree assault and battery. See S.C. Code Ann. § 16-3-600(C)(1) (defining the offense of first-degree assault and battery, which requires proof the actor injured another through nonconsensual touching of the "private parts" with "lewd and lascivious intent" in order to prove the offense in one of multiple ways); S.C. Code Ann. § 16-3-600(D)(1) (defining the offense of second-degree assault and battery, which requires proof the actor injured another person or offered or attempted to injure another person with the present ability to do so and the act involved the nonconsensual touching of the private parts of a person above or underneath the person's clothing in order to prove the offense in one of multiple ways). Critically though, the former offense of committing a lewd act on a minor was not and has not been historically recognized by our appellate courts as being a lesser-included offense of any criminal sexual conduct with a minor offenses despite the fact it involved "lewd and lascivious" conduct directed at a minor victim, such as the inappropriate touching of a child's "private parts." See State v. Norton, 286 S.C. 95, 96, 332 S.E.2d 531, 532 (1985) (instructing "the offense of committing a lewd act upon a minor is not a lesser included offense of first degree criminal sexual conduct on a minor" while further recognizing the statute defining the offense of committing a lewd act upon a minor made it unlawful "for any person over the age of fourteen years to wilfully and lewdly commit or attempt any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child"). Therefore, since the language employed by the legislature in the new statutory assault and battery offenses was highly similar in many ways to the language used to define an offense that historically has *not* been recognized as a lesser-included offense of criminal sexual conduct with a minor, the legislature's use of that language in no way demonstrates an intent for

those statutory offenses to be considered as lesser-included offenses of criminal sexual conduct with a minor offenses and, instead, more logically demonstrates an intent *to the contrary* in light of the fact the legislature was presumed to be aware of how our courts have previously interpreted such language in the context of lesser-included offenses. See State v. Bridgers, 329 S.C. 11, 14, 495 S.E.2d 196, 197-198 (1997) ("The General Assembly is presumed to be aware of the common law[.]"); State v. King, 412 S.C. 403, 409, 772 S.E.2d 189, 192 (Ct. App. 2015) ("The Legislature is presumed to know how the terms and phrases it uses in a statute have been interpreted in the past.").

Furthermore, as an additional reason why this Court should grant rehearing in his case, Hernandez appears to suggest this Court should agree with his position regardless of whether its right or wrong because a decision contrary to his position will allegedly have an adverse impact in "numerous" unidentified cases in which defendants supposedly pled guilty to various statutory assault and battery offenses after initially being charged with criminal sexual conduct offenses without being re-indicted or waiving presentment. Significantly though, even if Hernandez's unsupported claim about "numerous" other cases was correct, the fact a correct legal ruling on appeal would have an adverse impact in other cases in which incorrect rulings and decisions were made should not have—and has not historically had—an impact on the outcome of an appeal in South Carolina. For example, our Supreme Court in State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016), recently found error in the presentation of a jury instruction our appellate courts *had directly and consistently authorized* in the past. Compare Stukes, 416 S.C. at 500, 787 S.E.2d at 483 ("[W]e overrule our precedent to the extent it condones the use of section 16-3-657 as a jury charge."); with State v. Rayfield, 369 S.C. 106, 115, 631 S.E.2d 244, 249 (2006) ("We . . . conclude the Court of Appeals properly relied on [a prior Supreme Court decision] in

holding the trial judge did not err in charging the jury that the victim's testimony need not be corroborated by other testimony or evidence."). Undoubtedly, in doing so, the Supreme Court fully recognized its decision would result in adverse consequences in criminal cases in which the trial judge had done nothing more than faithfully follow its own prior directives. See Stukes, 416 S.C. at 500, n. 5, 787 S.E.2d at 483("[O]ur ruling is effective in this case and those which are pending on direct review or are not yet final, but not in post-conviction relief."); see also State v. Witherspoon, 418 S.C. 641, 642-643, 795 S.E.2d 685, 686 (2016) (reversing a conviction based on the decision in Stukes, which had not been issued until after the time of trial and after this Court had affirmed Witherspoon's conviction on direct appeal). Nevertheless, the Supreme Court reached the decision in Stukes regardless of the widespread consequences that decision would have in other cases because its decision was the one it believed was correct and mandated by the law. See Stukes, 416 S.C. at 499, 787 S.E.2d at 483 ("We are persuaded by the dissent in Rayfield and conclude this charge is confusing and violative of the constitutional provision prohibiting courts from commenting to the jury on the facts of a case."). Accordingly, the fact this Court's legally-correct and well-reasoned decision in Hernandez's case could have potential consequences in some other unidentified cases in which the law was not properly followed and applied would in no way warrant a grant of rehearing or any other action.

Finally, in seeking rehearing, Hernandez's maintains the evidence presented during trial warranted the submission of instructions on first-degree and second-degree assault and battery to the jury because there was some confusion based on the testimony as to whether he actually penetrated his eleven-year-old victim's vagina or merely unlawfully touched it. Notwithstanding the fact first-degree and second-degree assault and battery were properly not presented to the jury since they are *not* lesser-included offenses of second-degree criminal sexual conduct with a

minor, Hernandez's fact-based arguments demonstrate the erroneous and illogical nature of his appellate contentions. Critically, assuming Hernandez had only lewdly touched his minor victim's vagina without committing an act of penetration, the jury would have been required to acquit him of second-degree criminal sexual conduct with a minor based on the instructions presented by the trial judge, and the jury in Hernandez's case showed no reluctance to acquit when it believed the evidence was insufficient to prove a charge beyond a reasonable doubt, which was best demonstrated by the fact it acquitted Hernandez of two of the three indicted offenses. Likewise, if Hernandez had lewdly touched his victim's vagina without penetrating it, such an act would have constituted the "most serious" offense of third-degree criminal sexual conduct with a minor as opposed to some form of assault and battery that was not enacted to address the heightened seriousness of a criminal sexual act committed upon a juvenile victim. See S.C. Code Ann. § 16-3-655(C) ("A person is guilty of criminal sexual conduct with a minor in the third degree if the actor is over fourteen years of age and the actor wilfully and lewdly commits or attempts to commit a lewd or lascivious act upon or with the body, or its parts, of a child under sixteen years of age, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of the actor or the child."); see also S.C. Code Ann. § 17-25-45(C)(1) (identifying any form of criminal sexual conduct with minor as prohibited by Section 16-3-655 as a whole as constituting a "most serious" offense for recidivist sentencing purposes); S.C. Code Ann. § 17-25-45(C)(2) (identifying offenses that qualify as "serious" offenses for recidivist sentencing purposes and not including either first-degree or second-degree assault and battery in that list). In fact, since third-degree criminal sexual conduct with a minor is *not* a lesser-included offense of second-degree criminal sexual conduct with a minor pursuant to the elements test, Hernandez could have been—and still could be—charged with the distinct offense of third-

degree criminal sexual conduct with a minor for the touching that occurred separate and apart from the penetration of his victim's vagina *in addition to* being charged with second-degree criminal sexual conduct with a minor for the penetration that occurred. See State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (1996) ("A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses."); State v. Austin, 299 S.C. 456, 459, 385 S.E.2d 830, 832 (1989) ("Under South Carolina law, distinct criminal offenses may arise from a single act."). Under those circumstances, first-degree and second-degree assault and battery could not logically be considered as lesser-included offenses of second-degree criminal sexual conduct with a minor since any act of inappropriate touching of a minor's private parts without penetration would constitute a "most serious" offense prohibited by an entirely different provision of law from the provision prohibiting the offense for which Hernandez was indicted, which strongly demonstrates why the trial judge committed no error by declining to instruct the jury on the uncharged offenses of first-degree and second-degree assault and battery.[2]

In light of all those reasons coupled with the arguments raised in both the Final Brief of Respondent and the State's petition for rehearing, the statutory offenses of first-degree and second-degree assault and battery are *not* lesser-included offenses of second-degree criminal sexual conduct with a minor, and the trial judge properly declined to instruct the jury on those offenses in Hernandez's case. As a result, this Court should deny Hernandez's petition for

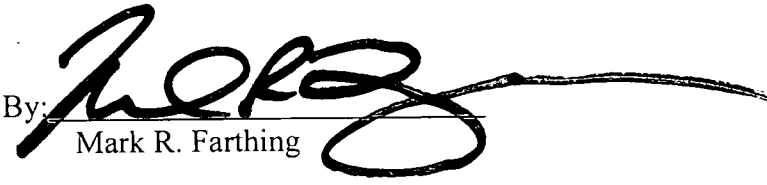
[2] Notably, the illogical and inconsistent nature of the common law tradition that treated common law assault and battery of a high and aggravated nature as a lesser-included offense of criminal sexual conduct offenses very well might have been the precise reason why the legislature elected *not* to treat the new statutory assault and battery offenses as lesser-included offenses of any criminal sexual conduct offenses when it enacted them. See Elliott, 346 S.C. at 607, 552 S.E.2d at 729 ("[W]e recognize this situation presents an anomaly in the law, akin to manslaughter and murder. The common law does not always fit into the neat categories we might prefer.").

rehearing and uphold its correct decision affirming Hernandez's conviction. However, for the reasons urged in the State's petition for rehearing, the State respectfully submits this Court should reconsider the matter pursuant to Rule 221(a), SCACR, vacate its prior opinion, and issue a new published opinion making the alterations proposed in the State's petition.

Respectfully submitted,

ALAN WILSON
Attorney General

MARK R. FARTHING
Assistant Attorney General

By: 
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THE STATE,

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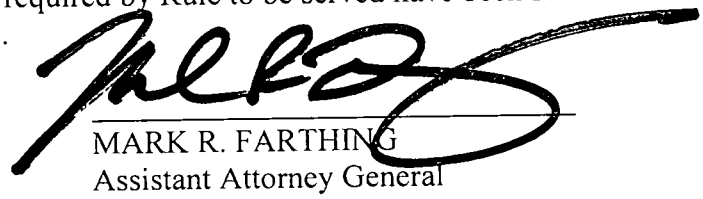
Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Return to Appellant's Petition for Rehearing on Appellant by sending two copies of the same to:

Susan B. Hackett, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.
This 16th day of August, 2018.



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ALAN WILSON
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August 16, 2018

The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: State v. Benjamin Cervantes Hernandez – Appellate Case 2016-000612

Dear Ms. Kitchings:

Enclosed please find the original and six copies of Return to Appellant's Petition for Rehearing, along with proof of service, for filing in the above-referenced appeal.

Sincerely,

Mark R. Farthing
Assistant Attorney General
Bar No. 76901

MRF/
Enclosures

cc: Susan B. Hackett, Esquire
Victim Services