

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Beaufort County
John C. Hayes, III, Circuit Court Judge

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S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

PETITIONER.

APPELLATE CASE NO. 2016-000612

APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Benjamin Cervantes Hernandez, Appellant.

Appellate Case No. 2016-000612

Appeal From Beaufort County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2018-UP-343
Submitted May 1, 2018 – Filed August 1, 2018

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, and Solicitor Isaac McDuffie Stone, III, of
Bluffton, all for Respondent.

PER CURIAM: Benjamin Cervantes Hernandez appeals his conviction for
criminal sexual conduct with a minor (CSCM) in the second degree, arguing the
trial court erred in not instructing the jury regarding the lesser-included offenses of

assault and battery in the first and second degrees when the offenses are lesser-included offenses of CSCM in the second degree and the evidence supported the instructions. We affirm.

FACTS

On July 17, 2015, Hernandez was visiting the home of a friend, Maria Pizana-Covos (Mother). One of Mother's daughters, Minor, told Mother that Hernandez touched her inappropriately. Minor was eleven years old at the time. Mother confronted Hernandez and called the police. Mother told the 911 operator there was no penetration.

Minor testified she was sitting on her couch with Hernandez and his girlfriend when Hernandez touched her "private part." She heard her baby brother crying in another room, so she went to give him a bottle. She said Hernandez followed her into the room, tried to prevent her from leaving, and touched her breasts while she was holding her brother. She took her brother into the living room, but Hernandez followed her back into the baby's room and put his hand in her underwear. She said he warned her it would get worse if she said anything about it. He also told her he wanted to kiss her when they were outside with the other children. She testified at trial that "his fingers went inside [her] private part." However, she told a therapist at Hope Haven that she was not sure if his fingers went inside her. She also told the responding police officer and the therapist at Hope Haven that Hernandez did not touch her on the couch or the first time he went into the baby's room.

Hernandez testified he went into the baby's room and tried to grab the baby from the edge of the bed so he did not fall. He said Minor grabbed him and kissed him between his cheek and his lips when he leaned down to get the baby. He said she then grabbed his hand and put it inside her pajamas and used her other hand to make "pressure between her legs." He pushed the baby back on the bed and pushed her to take his hand out. He admitted he felt moisture when he touched her genital area. He denied touching Minor on the couch, touching her breasts in the baby's room, and telling Minor he wanted to kiss her when they were outside.

Hernandez was indicted for two counts of CSCM with a minor in the third degree and one count of CSCM with a minor in the second degree. A trial was held on February 22-25, 2016. The jury found Hernandez was not guilty of two counts of CSCM in the third degree but found him guilty of CSCM with a minor in the second degree. The court sentenced him to 15 years' imprisonment with credit for

190 days. Hernandez was also placed on the sex offender registry. Hernandez filed a motion for new trial and a motion for reconsideration. The court denied the motions. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, we review the decisions of the trial court only for errors of law." *State v. Gilmore*, 396 S.C. 72, 77, 719 S.E.2d 688, 690 (Ct. App. 2011). "Therefore, in the context of a trial court's decision not to charge a requested lesser-included offense, we review the trial court's decision de novo." *Id.* A trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal. *State v. Brandenburg*, 419 S.C. 346, 349, 797 S.E.2d 416, 418 (Ct. App. 2017). "We must reverse and remand for a new trial if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." *Gilmore*, 396 S.C. at 77, 719 S.E.2d at 690-91.

LAW/ANALYSIS

Hernandez argues the trial court erred in not instructing the jury regarding the lesser-included offenses of assault and battery in the first and second degrees when the offenses are lesser-included offenses of CSCM in the second degree and the evidence supported the instructions. We disagree.

"A lesser-included offense is one whose elements are wholly contained within the crime charged." *State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011). "The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." *Brandenburg*, 419 S.C. at 350-51, 797 S.E.2d at 418 (quoting *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002)). "If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *Id.* at 351, 797 S.E.2d at 418 (quoting *Hope v. State*, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997)).

A person is guilty of CSCM in the second degree if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1) (2015). "Sexual battery" is defined 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 when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015).

A person is guilty of assault and battery in the first degree if they unlawfully injure another person, and the act "involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent." S.C. Code Ann. § 16-3-600(C)(1)(a)(i) (2015). A person is guilty of assault and battery in the second degree if they unlawfully injure another person, "or offer[] or attempt[] to injure another person with the present ability to do so," and "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)(b) (2015).

CSCM in the second degree is the touching of a minor's private parts. CSCM in the second degree does not require an injury and must involve a minor under the age of fourteen. Assault and battery in the first degree requires an injury and nonconsensual touching of a person's private parts. Assault and battery in the second degree requires an injury or an attempted injury and nonconsensual touching of a person's private parts. Therefore, because assault and battery in the first degree requires an injury and in the second degree requires an injury or an attempted injury, and CSCM in the second degree does not, the elements test fails.

At trial, Hernandez requested the trial court charge the jury with assault and battery in the first and second degrees as lesser-included offenses of CSCM in the second degree. Hernandez argued assault and battery in the first degree is the equivalent of the former common-law offense of assault and battery of a high and aggravated nature (ABHAN), which had been found to be a lesser-included offense of some criminal sexual conduct cases. Hernandez cited to *State v. Mathis*, 287 S.C. 589, 593-94, 340 S.E.2d 538, 541 (1986) (holding ABHAN is a lesser-included offense of criminal sexual conduct in the first degree, and a trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred that a defendant committed the lesser, rather than the greater offense), and *State v. Murphy*, 322 S.C. 321, 326, 471 S.E.2d 739, 741 (Ct. App. 1996) (ruling defendant was entitled to a charge of assault of a high and aggravated nature as a lesser-included offense of assault with intent to commit first degree criminal sexual conduct (CSC), and the trial judge erred in refusing such a request). The trial court denied Hernandez's request, stating, "had the legislature desired to include these crimes . . . under the CSC [as] lesser[-]included of the new assault and batter[y, t]hey could have included these offenses as lesser[-]included offenses by statute[,] but I'm not go[ing to] charge the lesser included." The trial court charged the jury

on the elements of second-degree and third-degree CSCM but did not present instructions on any other offenses. Hernandez did not object after the jury charge.

On appeal, Hernandez does not cite to a case that has found assault and battery in the first or second degree to be the lesser-included offenses of CSCM in the second degree. Instead, he again argues they should be based on our State's tradition of finding ABHAN to be a lesser-included offense of CSC even though the two offenses fail the traditional elements test. See *State v. Primus*, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) ("[T]he [supreme c]ourt most recently determined that because it had consistently held ABHAN is a lesser[-]included offense of assault with intent to commit CSC, it would continue this ruling even though the two offenses failed the traditional elements test. Similarly, the [supreme c]ourt has repeatedly held ABHAN is a lesser[-]included offense of first degree CSC. In order to have a uniform approach to CSC and ABHAN offenses, we likewise hold ABHAN is a lesser[-]included offense of first degree CSC." (citations omitted)).

In 2010, the South Carolina Legislature codified ABHAN and assault and battery in the first to third degrees. S.C. Code Ann. § 16-3-600 (2015). The statute provides that ABHAN is the lesser-included offense of attempted murder, assault and battery in the first degree is the lesser-included offense of ABHAN, assault and battery in the second degree is the lesser-included offense of assault and battery in the first degree, and assault and battery in the third degree is the lesser-included offense of assault and battery in the second degree. S.C. Code Ann. § 16-3-600 (2015). We find that had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided.¹

¹ In an unpublished opinion from November 29, 2017, *State v. Dawkins*, 2017 WL 5900266, at *1 (Ct. App. 2017), this court held ABHAN is a lesser-included offense of CSC with a minor because our courts have traditionally made such a finding. See *State v. Geiger*, 370 S.C. 600, 606, 635 S.E.2d 669, 672 (Ct. App. 2006) (explaining a crime may be a lesser-included offense if it "has traditionally been considered a lesser included offense of the greater"); *State v. Gilmore*, 396 S.C. 72, 76, 719 S.E.2d 688, 690 (Ct. App. 2011) ("ABHAN is a lesser[-]included offense of first[-]degree CSC."); *Moultrie v. State*, 354 S.C. 646, 648, 583 S.E.2d 436, 437 (2003) (allowing ABHAN as a lesser-included offense of CSC with a minor); *State v. Forbes*, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988) ("ABHAN may be a lesser-included offense of first-degree CSC with a minor when there is evidence the defendant committed only the lesser rather than the greater offense.").

Therefore, we find the trial court did not err in determining assault and battery in the first and second degrees are not lesser-included offenses of CSCM in the second degree. We need not determine if any evidence in the record supported a jury charge on assault and battery. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.²

SHORT, THOMAS, and HILL, JJ., concur.

We find no published cases since 2010, when the Legislature codified assault and battery in the first to third degrees, that have held assault and battery in the first and second degree are the lesser-included offenses of CSCM in the second degree.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE 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.

RESPONDENT’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 held the trial judge committed no error by determining the statutory offenses of first-degree and second-degree assault and battery were not lesser-included offenses of second-degree criminal sexual conduct with a minor. Respondent (“the State”) believes this Court’s holding was entirely correct and its opinion was well-reasoned.¹ Moreover, the State respectfully submits this Court’s opinion warrants

¹ Although the State fully agrees with this Court’s ultimate conclusion in Hernandez’s case, the State continues to maintain any issue Hernandez may have had with the trial judge’s jury instructions was waived when defense counsel expressly affirmed to the trial judge she had no issues with or objections to the jury instructions after they were presented. See State v. Brown, 402 S.C. 119, 125, 740 S.E.2d 493, 496 (2013) (“[Brown]’s trial counsel stated explicitly that he

publication for the benefit of the bench and bar since it addressed an important legal issue that has not yet been directly addressed in a published appellate decision but has arisen a number of times since the Omnibus Crime Reduction and Sentencing Reform Act of 2010 was enacted. However, out of concern a footnote included in the opinion could potentially be misconstrued and may lead to misapprehension of the case cited in the footnote, the State respectfully petitions for rehearing pursuant to Rule 221(a), SCACR.

Specifically, in its opinion, this Court correctly found first-degree and second-degree assault and battery were not lesser-included offenses of second-degree criminal sexual conduct with a minor pursuant to either the elements test for determining whether a particular offense is a lesser-included offense of another or any relevant statutory provisions. 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); 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.”). However, as part of its opinion, this Court included a footnote stating the following:

In an unpublished opinion from November 29, 2017, State v. Dawkins, 2017 WL 5900266, at *1 (Ct. App. 2017), this court held ABHAN is a lesser-included offense of CSC with a minor because

had no objection to the trial court’s instruction. Thus, [Brown]’s argument that the trial court erred in failing to apply section 16-13-30 as amended is unpreserved.”).

our courts have traditionally made such a finding. We find no published cases since 2010, when the Legislature codified assault and battery in the first to third degrees, that have held assault and battery in the first and second degree are the lesser-included offenses of CSCM in the second degree.

(emphasis added and citations omitted).

In State v. Dawkins, Op. No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017), this Court addressed—amongst other issues—the issue of whether the trial judge erred by refusing to instruct the jury on common law assault and battery of a high and aggravated nature (“ABHAN”) as a lesser-included offense of second-degree criminal sexual conduct with a minor. In that case, Dawkins was charged with second-degree criminal with a minor for acts committed on or before November 30, 2009, which was a time period *prior to* the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010. As a result, this Court’s conclusion common law ABHAN was a lesser-included offense of second-degree criminal sexual conduct with a minor in Dawkins was wholly based on the law in effect before common law ABHAN was abolished.²

² Despite the fact common law ABHAN had been abolished, a jury charge on that particular offense could still have been properly presented to the jury in Dawkins’s case had it been warranted by the evidence because the General Assembly elected to include a savings clause in the Omnibus Crime Reduction and Sentencing Reform Act of 2010. See Act No. 273, § 65, 2010 S.C. Acts & Joint Resolutions (“The repeal or amendment by the provisions of this act or any law, whether temporary or permanent or civil or criminal, does not affect pending actions, rights, duties, or liabilities founded thereon, or alter, discharge, release, or extinguish any penalty, forfeiture, or liability incurred under the repealed or amended law, unless the repealed or amended provision shall so expressly provide. After the effective date of this act, all laws repealed or amended by this act must be taken and treated as remaining in full force and effect for the purpose of sustaining any pending or vested right, civil action, special proceeding, criminal prosecution, or appeal existing as of the effective date of this act, and for the enforcement of rights, duties, penalties, forfeitures, and liabilities as they stood under the repealed or amended laws.”); see also State v. Bolin, 381 S.C. 557, 562, 673 S.E.2d 885, 887 (Ct. App. 2009) (“By stating that the Act is to have no effect on pending actions, criminal prosecutions, rights, duties, or liabilities, and that all laws repealed or amended by the Act must

In Hernandez’s case, the second-degree criminal sexual conduct with a minor charge for which he was ultimately convicted arose *after* the new legislation was enacted and common law ABHAN had been abolished in South Carolina. See 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.”); see also 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.”). Under those circumstances, the decision in Dawkins has no relevance to Hernandez’s case since its conclusions were based on the law in effect prior to the adoption of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 as opposed to after its adoption. Therefore, by referencing Dawkins in the footnote and stating this Court held ABHAN *is*—instead of *was*—a lesser-included offense of criminal sexual conduct with a minor, this Court’s opinion could potentially be misconstrued or misapprehended to unintentionally suggest ABHAN—either common law or statutory—remains a potential lesser-included offense of criminal sexual conduct offenses, including the offense of second-degree criminal sexual conduct with a minor. See, e.g., Shenoa L. Payne, *The Ethical Conundrums of Unpublished Opinions*, 44 Willamette L. Rev. 723, 728 (2008) (“With such widespread national availability of ‘unpublished’ opinions, the term ‘unpublished’ has a new and ironic meaning. . . . Even though a court may wish to prevent a particular opinion from having precedential effect, the court is at least aware that, whether

be treated as remaining in full force and effect, the clear language of the Act indicates that it is prospective.”).

designated 'published' or 'unpublished,' its opinion is 'going to be read, collected, and analyzed.' " (footnotes omitted).

Accordingly, for the foregoing reasons, the State respectfully urges this Court to reconsider this matter pursuant to Rule 221(a), SCACR, vacate its prior opinion, and issue a new published opinion that either omits the footnote referencing the unpublished decision in Dawkins or includes additional language in the footnote making it clear the Dawkins decision dealt with common law ABHAN as a lesser-included offense of criminal sexual conduct with a minor *prior* to the passage of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 while still affirming Hernandez's conviction for all the reasons this Court previously articulated. By doing so, this Court will provide needed guidance to the bench and bar on an important legal issue that has not yet been addressed in a published appellate decision in South Carolina while simultaneously preventing any unintended confusion on the issue of whether ABHAN remains a lesser-include offense of criminal sexual conduct offenses arising after the change in the law that took place in 2010.

Respectfully submitted,

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August 2, 2018

STATE OF SOUTH CAROLINA
IN THE 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,

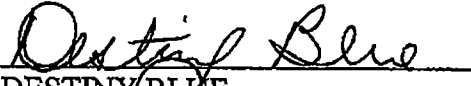
Appellant.

PROOF OF SERVICE

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

Susan B. Hackett, Esq.
S.C. Commission on Indigent Defense
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I further certify that all parties required by Rule to be served have been served.
This 2nd day of August, 2018.


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STATE OF SOUTH CAROLINA
 IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

APPELLATE CASE NO. 2016-000612

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-343

RETURN TO PETITION FOR REHEARING

On August 1, 2018, this Court issued a per curiam unpublished opinion affirming Appellant's conviction and sentence. State v. Hernandez, 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). The state filed a petition for rehearing on August 2, 2018, pursuant to Rule 221(a), SCACR.¹ By a letter dated August 3, 2018, this Court requested undersigned counsel file a return. In compliance with this Court's direction and pursuant to Rule 221(a), SCACR, Appellant files this return.

¹ On August 6, 2018, undersigned counsel filed a petition for rehearing as well.

In its petition for rehearing, the state raised four essential points. The state's first argument was that the issue presented was not preserved for appellate review. The second argument was that even if the issue were preserved, then Appellant's argument fails on the merits. Third, the state requested this Court publish its opinion in this case with one caveat. Fourth, the state asked this Court omit or offer additional explanation regarding a footnote reference to recent unpublished decision by this Court address a similar issue on appeal. Appellant will address each argument in turn.

Error Preservation

Respondent argued that the issue regarding the jury instruction was not preserved because defense counsel did not re-assert the objection and request to charge at the conclusion of the jury instructions. Pet. at 1 n.1. Appellant respectfully disagrees. "Where a party has requested that a certain proposition of law be charged and, after opportunity for discussion of it, the trial judge has declined to so charge, it is of course not necessary, in order to preserve the point on appeal, that objection to such ruling be made at the conclusion of the charge." Rogers v. Florence Printing Co., 233 S.C. 567, 580, 106 S.E.2d 258, 264 (1958).

The Supreme Court encountered a set of circumstances similar to the case at hand in State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980). During a charge conference, the solicitor requested a jury instruction on flight. Id. at 405, 272 S.E.2d at 170. Grant's counsel objected. Id. at 406, 272 S.E.2d at 170. The judge charged the jury regarding flight. Id. "After his charge was completed, the judge invited counsel ... to except to charges already made, or request additional charges. Counsel for the defendant interposed no exceptions or additional requests." Id. Responding to the state's argument that "defense counsel waived her objection by failing to object at the end of the charge," the Supreme Court held that "[w]hile there is imposed upon

counsel for a litigant the duty to assist the judge in his charge by pointing out alleged errors, ... that objection need not be interposed if earlier in the proceedings the judge had a fair opportunity to pass upon the issue.” Id. The Court explained that the positions of the judge and defense counsel were “made well known prior to the commencement of the charge.” Id. at 407, 272 S.E.2d at 171. Thus, the Court concluded, no “further objection was required.” Id.; see also State v. Johnson, 333 S.C. 62, 64 n.1, 508 S.E.2d 29, 30 n.1 (1998) (explaining that “where a party requests a jury charge and, after opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request at conclusion of the court’s instructions”).

According to the record, the judge and the parties engaged in a charge conference in chambers. R. 152, ll. 13-18. Subsequently, defense counsel requested to put the substance of the charge conference on the record, and the judge agreed. R. 152, ll. 13-18. Thereafter, defense counsel articulated her request for the lesser-included instructions. R. 152, l. 23 – R. 156, l. 15. The judge then denied the request and explained his reasoning for doing so. R. 156, l. 16 – R. 157, l. 5. Thereafter, closing arguments and the jury instructions ensued.

At the conclusion of the jury charge, the judge asked, “Anything from the state involving the charge?” R. 188, l. 13. The prosecutor responded negatively. R. 188, l. 14. The judge then asked, “Defense?” R. 188, l. 15. Defense counsel responded, “No, Your Honor.” R. 188, l. 16. This is exactly what transpired in Grant, supra. There was no requirement that defense counsel object again or renew her objection to the request to charge the lesser-included offenses because the record clearly disclosed defense counsel’s request, the argument in support of her request, and the judge’s denial of the request. Therefore, Appellant respectfully requests this Court

affirm its opinion to the extent this Court held the request for jury instructions was preserved for appellate review and deny the state's petition for rehearing on this ground.

Merits

The state argued this Court correctly determined “the trial judge committed no error by determining the statutory offenses of first-degree and second-degree assault and battery were not lesser-included offenses of second-degree criminal sexual conduct with a minor.” Pet. at 1; see also Pet. at 2. Appellant disagrees. In his petition for rehearing, Appellant detailed the significant points overlooked or misapprehended by this Court in arriving at its decision. Appellant incorporates by reference the arguments made in his petition for rehearing. Succinctly put, this Court erred by concluding that assault and battery in the first and second degrees are not lesser-included offenses of criminal sexual conduct (CSC). Traditionally, the Supreme Court has held that assault and battery of a high and aggravated nature (ABHAN) is a lesser-included offense of CSC. This Court should maintain that tradition. When codifying assault and battery, the Legislature was aware of the Court's jurisprudence regarding ABHAN as a lesser-included offense of CSC and expressed no language to renounce such moving forward. Finally, in the assault and battery statutory scheme, the Legislature used language regarding “sexual touching” to evince its understanding that the assault and battery offenses were to be treated as lesser-included offenses of CSC.

Therefore, Appellant respectfully requests this Court deny the state's petition for rehearing on this ground.

Unpublished Opinion

Appellant agrees with the state that the issue presented is “an important legal issue that has not yet been directly addressed in a published appellate decision.” Pet. at 2; see also Pet. at

5. As mentioned in Appellant's petition for rehearing, it is undersigned counsel's belief that numerous criminal sexual conduct cases have been resolved as assault and battery offenses either through guilty pleas or through jury instructions. Further, it is Appellant's understanding that members of the bench and bar have been operating under the well-reasoned belief that statutory assault and battery offenses are lesser-included offenses of CSC.

The state requested publication of this Court's opinion in light of the significant legal issue addressed. Despite Appellant's agreement that the legal issue addressed is important and not directly addressed in a published appellate opinion, Appellant respectfully disagrees that the opinion warrants publication due to its erroneous conclusion and the potential ripple effect the publication of an erroneous opinion of this magnitude may have. Appellant and the state agree that the trial bench and bar routinely address questions concerning lesser-included offenses and the specific question of whether statutory the assault and battery offenses are lesser-included offenses of CSC has arisen numerous times; however, Appellant disagrees with the notion that this Court's current opinion would add clarity because it is Appellant's argument that the opinion is erroneously decided. Therefore, Appellant respectfully requests this Court deny the state's petition for rehearing on this ground and maintain the opinion as unpublished.

Reference to State v. Dawkins

Finally, the state requested this Court publish its opinion, but only if this Court omitted or further explained a footnote regarding State v. Dawkins, Op. No. 2017-UP-442 (S.C. Ct. App. filed Nov. 29, 2017). Pet. at 5. In a footnote, this Court stated, "[i]n an unpublished opinion from November 29, 2017, State v. Dawkins, 2017 WL 5900266, at *1 (Ct. App. 2017), this Court held ABHAN is a lesser-included offense of CSC with a minor because our courts have traditionally made such a finding." The state argued "the decision in Dawkins has no relevance

to Hernandez's case since its conclusions were based on the law in effect prior to the adoption of the Omnibus Crime Reduction and Sentencing Reform Act of 2010 as opposed to after its adoption." Pet. at 4. According to the state, this Court's reference to Dawkins in the footnote and the use of the present tense verb "is," "this Court's opinion could potentially be misconstrued or misapprehended to unintentionally suggest ABHAN – either common law or statutory – remains a potential lesser-included offense of criminal sexual conduct offenses, including the offense of second-degree criminal sexual conduct with a minor." Pet. at 4.

Appellant's familiarity with Dawkins is limited to the publicly available information. According to this Court's opinion, the charges against Dawkins concerned, in part, events prior to November 30, 2009 and on November 30, 2009. The appellate briefs refer only to events on or before November 30, 2009. Therefore, the criminal charges against Dawkins arose prior to the enactment of statutory ABHAN and assault and battery, and Dawkins could not have been charged with those statutory offenses. See Jernigan v. State, 340 S.C. 256, 261, 531 S.E.2d 507, 509 (2000) (discussing when an ex post facto violation occurs); see also, Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); Garner v. Jones, 529 U.S. 244, 253 (2000).

Despite the state's current argument that the argument in Dawkins "was wholly based on the law in effect before common law ABHAN was abolished," the state's appellate brief in Dawkins argued the issue as if the question were whether statutory ABHAN was a lesser-included offense of criminal sexual conduct with a minor. See Pet. at 3.² In light of the state's argument in its appellate brief in Dawkins, Appellant cannot agree that the reference in a footnote to Dawkins in Hernandez "could potentially be misconstrued or misapprehended to unintentionally suggest

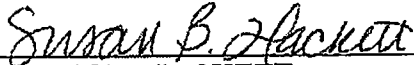
² Undersigned counsel has been informed that the state submitted a letter to this Court stating that an oversight had been made regarding the applicable law in the preparation of the briefs and conceding that the issue presented concerned common law ABHAN, not statutory ABHAN. This letter is not publicly available.

ABHAN – either common law or statutory – remains a potential lesser-included offense of criminal sexual conduct offenses, including the offense of second-degree criminal sexual conduct with a minor.” Due to the framing of the issue by the state on appeal in Dawkins, this Court may have held that common law or statutory ABHAN is a lesser-included offense of criminal sexual conduct charges, and, therefore, any construing or apprehending of the opinion in such a way would be entirely proper. Despite the contention that a clarifying letter was submitted concerning the state’s concession that the governing law concerned common law ABHAN, the unavailability of such a letter to the bench and bar creates confusion regarding the exact issue resolved by this Court in Dawkins. Therefore, Appellant respectfully requests this Court deny the state’s petition for rehearing on this ground.

Conclusion

Appellant respectfully requests this Court deny the state’s petition for rehearing.

Respectfully submitted,



SUSAN B. HACKETT
Appellate Defender

This 8th day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Return to Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Benjamin Cervantes Hernandez, #367274, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of August, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 8th day of August, 2018.

Karla Benson (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

STATE OF SOUTH CAROLINA
 IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

APPELLATE CASE NO. 2016-000612

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-343

PETITION FOR REHEARING

On August 1, 2018, this Court issued a per curiam unpublished opinion affirming Appellant's conviction and sentence. State v. Hernandez, 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). The issue on appeal was whether assault and battery in the first and second degrees are lesser-included offenses of criminal sexual conduct with a minor (CSCM) in the second degree. This Court held they were not. Pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing on this issue due to the significant points overlooked and/or misapprehended by this Court as explained in greater detail below.

The state charged Appellant with CSCM in the second degree related to Minor 1. Specifically, in the indictment, the state alleged that on July 17, 2015, Appellant “did commit a sexual battery upon a minor who was fourteen (14) years of age or less but who was at least eleven (11) years of age, to wit: digital penetration of victim, [Minor 1]’s, vagina.” R. 235. The plain language of the indictment made clear that the state was required to prove digital penetration of Minor 1’s vagina.

Based upon the evidence presented, Appellant requested the trial judge instruct the jury regarding two lesser-included offenses: assault and battery in the first degree and assault and battery in the second degree. R. 152, l. 23 – R. 153, l. 4. Appellant explained the request was based upon prior determinations by the South Carolina Supreme Court that common law ABHAN, which was the unlawful act of violent injury to the person of another accompanied by circumstances of aggravation, was a lesser included offense of criminal sexual conduct with a minor. R. 153, ll. 10-23. Appellant equated common law ABHAN with assault and battery in the first degree because both require unlawful injury and non-consensual touching. R. 155, ll. 1-4. Further, Appellant noted that statutory assault and battery in the first and second degree involved “non-consensual touching of the private parts of a person either under or above the clothing.” R. 155, ll. 13-16; R. 155, ll. 19-21.

In denying the request, the judge noted he had “analyzed and reanalyzed and maybe over analyzed whether or not” the statutory assault and battery offenses were lesser-included offenses of criminal sexual conduct. R. 151, ll. 13-18. He found the offenses were not lesser-included offenses “based on the test – the elements test – the analysis of the elements test.” R. 151, ll. 21-23. Specifically, he determined “they require proof of injury whereas the charges which are set forth in the indictment do not.” R. 151, ll. 23-25. Further, the judge held that based upon the legislature

taking “great pains to explain” “which offenses are lesser of which higher offenses” in the statutory assault and battery scheme, the judge believed “that had the legislature desired to include these crimes these charges under the CSC [as lesser included of the new assault and batteries” “[t]hey could have included these offenses as lesser included offenses by statute.” R. 156, l. 16 – R. 157, l. 2. As a result, the judge refused to charge the jury regarding any lesser-included offenses.

This Court affirmed the trial judge’s decision. In reaching its conclusion, this Court utilized the “elements test.” This Court reasoned as follows:

CSCM in the second degree is the touching of a minor’s private parts. CSCM in the second degree does not require an injury and must involve a minor under the age of fourteen. Assault and battery in the first degree requires an injury and nonconsensual touching of a person’s private parts. Assault and battery in the second degree requires an injury or an attempted injury and nonconsensual touching of a person’s private parts. Therefore, because assault and battery in the first degree requires an injury and in the second degree requires an injury or an attempted injury, and CSCM in the second degree does not, the elements test fails.

Additionally, this Court faulted Appellant for “not cit[ing] a case that has found assault and battery in the first or second degree to be the lesser-included offense of CSCM in the second degree.” However, Appellant is not aware of any cases *at all* addressing the issue presented in this case. As this Court noted in its opinion, the statutory offenses of assault and battery were only recently codified in 2010. In the mere eight years since their codification, no South Carolina appellate court has addressed whether the assault and battery offenses are lesser-included offenses of CSC. Therefore, Appellant could not cite to any case – in support of or against his position– as none existed.

In referring to the recent codification of the assault and battery offenses, this Court declared that “had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided.” While it is true that the Legislature could have specifically stated that assault and battery is a lesser-included offense, it was unnecessary for

the Legislature to do so in light of existing case law declaring ABHAN a lesser-included offense of CSCM. The Legislature is presumed to be aware of the Supreme Court's rulings. State v. Sawyer, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014); McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). Fully aware that the Supreme Court had ruled that ABHAN was a lesser-included offense of CSC, see State v. Primus, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Legislature did not provide that the assault and battery offenses *not* be treated as lesser-included offenses of CSC.¹ When the Legislature codified ABHAN and created the statutory scheme for assault and batteries, the Legislature was aware of South Carolina's longstanding jurisprudence of treating ABHAN as a lesser included of CSC. Had the legislature sought to change this, it could have done so easily.

An issue similar to the one presented sub judice arose after the codification of assault with intent to commit CSC (ACSC). In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), overruled on other grounds by Gentry, supra, the Supreme Court held its jurisprudence of consistently incorporating ABHAN into the CSC framework as a lesser-included offense of ACSC survived the codification of the CSC statutes. The Court explained that "the 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." Id. at 607 n.2, 552 S.E.2d at 729 n.2 (citing State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997)). Thus, the Court recognized the "anomaly in the

¹ South Carolina case law has consistently held that ABHAN is a lesser-included offense of CSC. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) abrogated on other grounds by State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988); State v. Pressley, 292 S.C. 9, 10, 354 S.E.2d 777, 777 (1987); State v. Mathis, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986); State v. Drafts, 288 S.C. 30, 33, 340 S.E.2d 784, 785 (1986); State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983); State v. Gilmore, 396 S.C. 72, 76, 719 S.E.2d 688, 690 (Ct. App. 2011); State v. Fields, 356 S.C. 517, 522, 589 S.E.2d 792, 795 (Ct. App. 2003); State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996).

law” created by recognizing ABHAN as a lesser included offense of ACSC due to the strict same elements test; however, the Court explained “[t]he common law does not always fit into the neat categories we might prefer.” The Court found “compelling reasons not to abandon [its] longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes.” Id. at 607, 552 S.E.2d at 729.

In 2010, the South Carolina Legislature codified ABHAN and various degrees of assault and battery. Specifically, the General Assembly explained that ABHAN occurs when a “person unlawfully injures another person” 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(B)(1). Continuing with the statutory scheme, the legislature explained assault and battery in the first degree occurs if (1) a person unlawfully injures another person and (2) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent. S.C. Code Ann. § 16-3-600(C)(1)(a)(i). Similarly, assault and battery in the second degree occurs when a person (1) unlawfully injures another person, or (2) offers or attempts to injure another person with the present ability to do so, and (3) moderate bodily injury to another person could have resulted or (4) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing. S.C. Code Ann. § 16-3-655(D)(1)(b).

A person is guilty of CSCM in the second degree if the person “engages in a sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.” S.C. Code Ann. § 16-3-655(B)(1). Sexual battery is “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 when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h).

The very language chosen by the legislature in the assault and battery statutory scheme reveals its intent that the assault and battery statutes be considered lesser-included offenses of the criminal sexual conduct offenses. Just as the assault and battery statutes reference private parts, which are defined as the genital area or the buttocks of a male or female or the breasts of a female, the CSC statute defines "intimate parts" as "the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being." Cf. S.C. Code Ann. § 16-3-600(A)(3) with S.C. Code Ann. § 16-3-651(d). Both reference "lewd and lascivious intent." Cf. S.C. Code Ann. § 16-3-600(C)(1)(i) with S.C. Code Ann. § 16-3-655(C). This language shows the Legislature's intent for assault and battery offenses to be lesser-included offenses of CSCM.

Following the codification and in light of the dearth of case law addressing the matter, most judges and practitioners relied upon McAninch's explanation that where common law ABHAN was a lesser-included offense of CSC in the first degree, "the same should be true when the statutory assault and battery crimes are charged." William S. McAninch, et al., The Criminal Law of South Carolina, 239-240 (6th ed. 2013).² McAninch explained that "[w]ith the new statutory offenses, it would appear that 1st and 2nd degree assault and battery would more appropriately be lesser-included crimes of CSC in the 1st degree as the definition of each of these crimes includes a nonconsensual sexual touching." Id. at 247. Further, McAninch, relying upon the analysis in

² It is undersigned counsel's belief that over the last eight years numerous criminal sexual conduct cases have been resolved through guilty pleas to statutory assault and battery offenses without the state re-indicting the defendants or the trial courts obtaining waivers of presentments of indictments to the grand juries based upon the belief that statutory assault and battery is a lesser-included offense of criminal sexual conduct. The same may be true for trials as judges may have charged assault and battery as lesser-included offenses to juries. If this Court's opinion remains the same, then those convictions would be void because the trial court lacked subject matter jurisdiction to convict the defendants of crimes that were not lesser-included offenses of the offenses charged in the indictment. See State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).

Elliott, supra, noted that “[u]nder the new statutory scheme, it would be that 2nd degree assault and battery is the appropriate lesser-included crime for assault with intent to commit criminal sexual conduct” because “[f]irst degree assault and battery does not seem to cover an assault (or attempt) to touch another person’s private parts, only the actual touching” whereas “[s]econd degree includes the act of touching or an offer or attempt to injure another person by touching them inappropriately.” Id. at 249 (internal quotation omitted).

In rendering its decision, this Court overlooked or misapprehended the case law concerning the Legislature’s assumed familiarity with the Court’s precedents. This Court failed to address Appellant’s argument that the language of the assault and battery statutes includes “sexual touching,” evincing the Legislature’s intent for those offenses to be lesser-included offenses of the criminal sexual conduct offenses.

Additionally, ample evidence in the record required the trial judge to instruct the jury on the lesser-included offenses of assault and battery in the first and second degrees. A jury charge to a lesser included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241, 241 (1996). In other words, the evidence must allow “a rational inference” that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), “[i]n order to justify a charge of a lesser included offense, the evidence

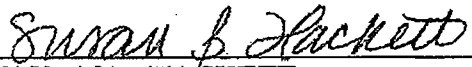
must be capable of sustaining either the greater or the lesser offense, depending on the jury's view of the facts."

"[I]n the context of a trial court's decision not to charge a requested lesser included offense, [the appellate court] review[s] the trial court's decision de novo." The appellate court must reverse and remand for a new trial "if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690-691 (Ct. App. 2011). This Court recognized "three types of cases in which the evidence can support an inference," one of which occurred when "there is evidence the defendant committed a nonsexual ABHAN, such as in a fight and in addition to evidence to support CSC, there is evidence the two never had sex." Id. at 77-78, 719 S.E.2d at 691 (citing State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983)).

The evidence presented clearly supported jury instructions on the lesser-included offenses of assault and battery in the first and second degrees. In order for the jury to convict Appellant of CSCM in the second degree, the jury was required to find an "intrusion" of Minor 1's vagina by Appellant's finger. However, the testimony regarding any "intrusion" was contradictory. Minor 1 testified there had been an intrusion, but she told the forensic interviewer that she did not understand the question when posed. Also, Minor 1's mother told the 911 operator there had been no penetration. Additionally, Appellant's testimony indicated a touching only – no intrusion, no penetration. Thus, the evidence before the jury was susceptible to more than one interpretation – a touching only or an intrusion. Thus, Appellant was entitled to an instruction on a lesser-included offense to cover the evidence presented – that he had only touched Minor 1.

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter to address the significant points overlooked or misapprehended by this Court in reaching its conclusion.

Respectfully Submitted,



SUSAN B. HACKETT
Appellate Defender

This 6th day of August, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Benjamin Cervantes Hernandez, #367274, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 6th day of August, 2018.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 6th day of August, 2018.

Mark Kendall (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

STATE OF SOUTH CAROLINA
IN THE 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

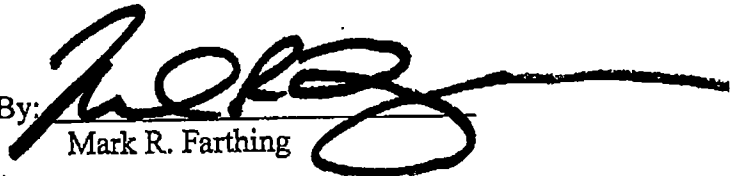
²Notably, the illogical and inconsistent nature of the common law tradition that treated common law assault and battery of a high and aggravated nature as a lesser-included offense of criminal sexual conduct offenses very well might have been the precise reason why the legislature elected *not* to treat 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,

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August 16, 2018

STATE OF SOUTH CAROLINA
IN THE 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,

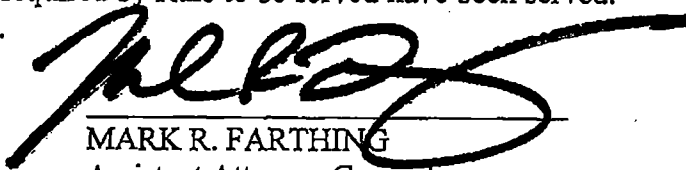
Appellant.

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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The South Carolina Court of Appeals

The State, Respondent,

v.

Benjamin Cervantes Hernandez, Appellant.

Appellate Case No. 2016-000612

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied. We also decline to grant the State's request for publication of this opinion. The attached opinion is substituted for the previous opinion, which is withdrawn.

Paul E. Short, Jr.

J.

Paul W. Brown

J.

D. Manlin

J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire

Susan Barber Hackett, Esquire

Mark Reynolds Farthing, Esquire

Isaac McDuffie Stone, III, Esquire

The Honorable John C. Hayes, III

FILED

Sept 26, 2018

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Benjamin Cervantes Hernandez, Appellant.

Appellate Case No. 2016-000612

Appeal From Beaufort County
John C. Hayes, III, Circuit Court Judge

Unpublished Opinion No. 2018-UP-343
Submitted May 1, 2018 – Filed August 1, 2018
Withdrawn, Substituted and Refiled September 26, 2018

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Mark Reynolds Farthing, both of
Columbia, and Solicitor Isaac McDuffie Stone, III, of
Bluffton, all for Respondent.

PER CURIAM: Benjamin Cervantes Hernandez appeals his conviction for
criminal sexual conduct with a minor (CSCM) in the second degree, arguing the

trial court erred in not instructing the jury regarding the lesser-included offenses of assault and battery in the first and second degrees when the offenses are lesser-included offenses of CSCM in the second degree and the evidence supported the instructions. We affirm.

FACTS

On July 17, 2015, Hernandez was visiting the home of a friend, Maria Pizana-Covos (Mother). One of Mother's daughters, Minor, told Mother that Hernandez touched her inappropriately. Minor was eleven years old at the time. Mother confronted Hernandez and called the police. Mother told the 911 operator there was no penetration.

Minor testified she was sitting on her couch with Hernandez and his girlfriend when Hernandez touched her "private part." She heard her baby brother crying in another room, so she went to give him a bottle. She said Hernandez followed her into the room, tried to prevent her from leaving, and touched her breasts while she was holding her brother. She took her brother into the living room, but Hernandez followed her back into the baby's room and put his hand in her underwear. She said he warned her it would get worse if she said anything about it. He also told her he wanted to kiss her when they were outside with the other children. She testified at trial that "his fingers went inside [her] private part." However, she told a therapist at Hope Haven that she was not sure if his fingers went inside her. She also told the responding police officer and the therapist at Hope Haven that Hernandez did not touch her on the couch or the first time he went into the baby's room.

Hernandez testified he went into the baby's room and tried to grab the baby from the edge of the bed so he did not fall. He said Minor grabbed him and kissed him between his cheek and his lips when he leaned down to get the baby. He said she then grabbed his hand and put it inside her pajamas and used her other hand to make "pressure between her legs." He pushed the baby back on the bed and pushed her to take his hand out. He admitted he felt moisture when he touched her genital area. He denied touching Minor on the couch, touching her breasts in the baby's room, and telling Minor he wanted to kiss her when they were outside.

Hernandez was indicted for two counts of CSCM with a minor in the third degree and one count of CSCM with a minor in the second degree. A trial was held on February 22-25, 2016. The jury found Hernandez was not guilty of two counts of CSCM in the third degree but found him guilty of CSCM in the second degree.

The court sentenced him to 15 years' imprisonment with credit for 190 days. Hernandez was also placed on the sex offender registry. Hernandez filed a motion for new trial and a motion for reconsideration. The court denied the motions. This appeal followed.

STANDARD OF REVIEW

"In criminal cases, we review the decisions of the trial court only for errors of law." *State v. Gilmore*, 396 S.C. 72, 77, 719 S.E.2d 688, 690 (Ct. App. 2011).

"Therefore, in the context of a trial court's decision not to charge a requested lesser-included offense, we review the trial court's decision de novo." *Id.* A trial court's refusal to give a requested jury charge must be both erroneous and prejudicial to the defendant to warrant reversal. *State v. Brandenburg*, 419 S.C. 346, 349, 797 S.E.2d 416, 418 (Ct. App. 2017). "We must reverse and remand for a new trial if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged." *Gilmore*, 396 S.C. at 77, 719 S.E.2d at 690-91.

LAW/ANALYSIS

Hernandez argues the trial court erred in not instructing the jury regarding the lesser-included offenses of assault and battery in the first and second degrees when the offenses are lesser-included offenses of CSCM in the second degree and the evidence supported the instructions. We disagree.

"A lesser-included offense is one whose elements are wholly contained within the crime charged." *State v. Dickerson*, 395 S.C. 101, 118, 716 S.E.2d 895, 904 (2011). "The primary test for determining if a particular offense is a lesser included of the offense charged is the elements test. The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense." *Brandenburg*, 419 S.C. at 350-51, 797 S.E.2d at 418 (quoting *State v. Watson*, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002)). "If the lesser offense includes an element not included in the greater offense, then the lesser offense is not included in the greater." *Id.* at 351, 797 S.E.2d at 418 (quoting *Hope v. State*, 328 S.C. 78, 81, 492 S.E.2d 76, 78 (1997)).

A person is guilty of CSCM in the second degree if "the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age." S.C. Code Ann. § 16-3-655(B)(1) (2015). "Sexual battery" is defined 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 when such intrusion is accomplished for medically recognized treatment or diagnostic purposes." S.C. Code Ann. § 16-3-651(h) (2015).

A person is guilty of assault and battery in the first degree if they unlawfully injure another person, and the act "involves nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent." S.C. Code Ann. § 16-3-600(C)(1)(a)(i) (2015). A person is guilty of assault and battery in the second degree if they unlawfully injure another person, "or offer[] or attempt[] to injure another person with the present ability to do so," and "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)(b) (2015).

CSCM in the second degree is the touching of a minor's private parts. CSCM in the second degree does not require an injury and must involve a minor under the age of fourteen. Assault and battery in the first degree requires an injury and nonconsensual touching of a person's private parts. Assault and battery in the second degree requires an injury or an attempted injury and nonconsensual touching of a person's private parts. Therefore, because assault and battery in the first degree requires an injury and in the second degree requires an injury or an attempted injury, and CSCM in the second degree does not, the elements test fails.

At trial, Hernandez requested the trial court charge the jury with assault and battery in the first and second degrees as lesser-included offenses of CSCM in the second degree. Hernandez argued assault and battery in the first degree is the equivalent of the former common-law offense of assault and battery of a high and aggravated nature (ABHAN), which had been found to be a lesser-included offense of some criminal sexual conduct cases. Hernandez cited to *State v. Mathis*, 287 S.C. 589, 593-94, 340 S.E.2d 538, 541 (1986) (holding ABHAN is a lesser-included offense of criminal sexual conduct in the first degree, and a trial judge is required to charge the jury on a lesser-included offense if there is evidence from which it could be inferred that a defendant committed the lesser, rather than the greater offense), and *State v. Murphy*, 322 S.C. 321, 326, 471 S.E.2d 739, 741 (Ct. App. 1996) (ruling defendant was entitled to a charge of assault of a high and aggravated nature as a lesser-included offense of assault with intent to commit first degree criminal sexual conduct (CSC), and the trial judge erred in refusing such a request). The trial court denied Hernandez's request, stating, "had the legislature desired to include these crimes . . . under the CSC [as] lesser[-]included of the new assault and batter[y, t]hey could have included these offenses as lesser[-]included offenses by statute[.]"

but I'm not go[ing to] charge the lesser[-]included." The trial court charged the jury on the elements of second-degree and third-degree CSCM but did not present instructions on any other offenses. Hernandez did not object after the jury charge.

On appeal, Hernandez does not cite to a case that has found assault and battery in the first or second degree to be the lesser-included offenses of CSCM in the second degree. Instead, he again argues they should be based on our State's tradition of finding ABHAN to be a lesser-included offense of CSC even though the two offenses fail the traditional elements test. *See State v. Primus*, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) ("[T]he [supreme c]ourt most recently determined that because it had consistently held ABHAN is a lesser[-]included offense of assault with intent to commit CSC, it would continue this ruling even though the two offenses failed the traditional elements test. Similarly, the [supreme c]ourt has repeatedly held ABHAN is a lesser[-]included offense of first degree CSC. In order to have a uniform approach to CSC and ABHAN offenses, we likewise hold ABHAN is a lesser[-]included offense of first degree CSC." (citations omitted)).

In 2010, the South Carolina Legislature codified ABHAN and assault and battery in the first to third degrees. S.C. Code Ann. § 16-3-600 (2015). The statute provides that ABHAN is the lesser-included offense of attempted murder, assault and battery in the first degree is the lesser-included offense of ABHAN, assault and battery in the second degree is the lesser-included offense of assault and battery in the first degree, and assault and battery in the third degree is the lesser-included offense of assault and battery in the second degree. S.C. Code Ann. § 16-3-600 (2015). We find that had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided.

Therefore, we find the trial court did not err in determining assault and battery in the first and second degrees are not lesser-included offenses of CSCM in the second degree. We need not determine if any evidence in the record supported a jury charge on assault and battery. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

CONCLUSION

Accordingly, the decision of the trial court is

AFFIRMED.¹

SHORT, THOMAS, and HILL, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT

APPELLATE CASE NO. 2016-000612

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

Opinion No. 2018-UP-343

PETITION FOR REHEARING

On August 1, 2018, this Court issued a per curiam unpublished opinion affirming Appellant's conviction and sentence. State v. Hernandez, 2018-UP-343 (S.C. Ct. App. filed Aug. 1, 2018). The issue on appeal was whether assault and battery in the first and second degrees are lesser-included offenses of criminal sexual conduct with a minor (CSCM) in the second degree. This Court held they were not. On August 2, 2018, the state filed a petition for rehearing. On August 6, 2018, Appellant filed a petition for rehearing. On September 26, 2018, this Court denied the petitions for rehearing; however, this Court withdrew the previous opinion and substituted a new opinion. In the new opinion, this Court omitted a footnote. Therefore,

pursuant to Rule 221(a), SCACR, Appellant respectfully requests rehearing on the issue presented due to the significant points overlooked and/or misapprehended by this Court as explained in greater detail below.

The state charged Appellant with CSCM in the second degree related to Minor 1. Specifically, in the indictment, the state alleged that on July 17, 2015, Appellant "did commit a sexual battery upon a minor who was fourteen (14) years of age or less but who was at least eleven (11) years of age, to wit: digital penetration of victim, [Minor 1]'s, vagina." R. 235. The plain language of the indictment made clear that the state was required to prove digital penetration of Minor 1's vagina.

Based upon the evidence presented, Appellant requested the trial judge instruct the jury regarding two lesser-included offenses: assault and battery in the first degree and assault and battery in the second degree. R. 152, l. 23 – R. 153, l. 4. Appellant explained the request was based upon prior determinations by the South Carolina Supreme Court that common law ABHAN, which was the unlawful act of violent injury to the person of another accompanied by circumstances of aggravation, was a lesser included offense of criminal sexual conduct with a minor. R. 153, ll. 10-23. Appellant equated common law ABHAN with assault and battery in the first degree because both require unlawful injury and non-consensual touching. R. 155, ll. 1-4. Further, Appellant noted that statutory assault and battery in the first and second degree involved "non-consensual touching of the private parts of a person either under or above the clothing." R. 155, ll. 13-16; R. 155, ll. 19-21.

In denying the request, the judge noted he had "analyzed and reanalyzed and maybe over analyzed whether or not" the statutory assault and battery offenses were lesser-included offenses of criminal sexual conduct. R. 151, ll. 13-18. He found the offenses were not lesser-included offenses

“based on the test – the elements test – the analysis of the elements test.” R. 151, ll. 21-23. Specifically, he determined “they require proof of injury whereas the charges which are set forth in the indictment do not.” R. 151, ll. 23-25. Further, the judge held that based upon the legislature taking “great pains to explain” “which offenses are lesser of which higher offenses” in the statutory assault and battery scheme, the judge believed “that had the legislature desired to include these crimes these charges under the CSC []as lesser included of the new assault and batteries” “[t]hey could have included these offenses as lesser included offenses by statute.” R. 156, l. 16 – R. 157, l. 2. As a result, the judge refused to charge the jury regarding any lesser-included offenses.

This Court affirmed the trial judge’s decision. In reaching its conclusion, this Court utilized the “elements test.” This Court reasoned as follows:

CSCM in the second degree is the touching of a minor’s private parts. CSCM in the second degree does not require an injury and must involve a minor under the age of fourteen. Assault and battery in the first degree requires an injury and nonconsensual touching of a person’s private parts. Assault and battery in the second degree requires an injury or an attempted injury and nonconsensual touching of a person’s private parts. Therefore, because assault and battery in the first degree requires an injury and in the second degree requires an injury or an attempted injury, and CSCM in the second degree does not, the elements test fails.

Additionally, this Court faulted Appellant for “not cit[ing] a case that has found assault and battery in the first or second degree to be the lesser-included offense of CSCM in the second degree.” However, Appellant is not aware of any cases *at all* addressing the issue presented in this case. As this Court noted in its opinion, the statutory offenses of assault and battery were only recently codified in 2010. In the mere eight years since their codification, no South Carolina appellate court has addressed whether the assault and battery offenses are lesser-included offenses of CSC. Therefore, Appellant could not cite to any case – in support of or against his position – as none existed.

In referring to the recent codification of the assault and battery offenses, this Court declared that “had the Legislature intended for assault and battery in the first and second degrees to be lesser-included offenses of CSCM, it could have so provided.” While it is true that the Legislature could have specifically stated that assault and battery is a lesser-included offense, it was unnecessary for the Legislature to do so in light of existing case law declaring ABHAN a lesser-included offense of CSCM. The Legislature is presumed to be aware of the Supreme Court’s rulings. State v. Sawyer, 409 S.C. 475, 481, 763 S.E.2d 183, 186 (2014); McLeod v. Starnes, 396 S.C. 647, 660, 723 S.E.2d 198, 205 (2012). Fully aware that the Supreme Court had ruled that ABHAN was a lesser-included offense of CSC, see State v. Primus, 349 S.C. 576, 581, 564 S.E.2d 103, 106 (2002) overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Legislature did not provide that the assault and battery offenses *not* be treated as lesser-included offenses of CSC.¹ When the Legislature codified ABHAN and created the statutory scheme for assault and batteries, the Legislature was aware of South Carolina’s longstanding jurisprudence of treating ABHAN as a lesser included of CSC. Had the legislature sought to change this, it could have done so easily.

An issue similar to the one presented sub judice arose after the codification of assault with intent to commit CSC (ACSC). In State v. Elliott, 346 S.C. 603, 607, 552 S.E.2d 727, 729 (2001), overruled on other grounds by Gentry, supra, the Supreme Court held its jurisprudence of consistently incorporating ABHAN into the CSC framework as a lesser-included offense of ACSC

¹ South Carolina case law has consistently held that ABHAN is a lesser-included offense of CSC. Dempsey v. State, 363 S.C. 365, 371, 610 S.E.2d 812, 815 (2005) abrogated on other grounds by State v. White, 361 S.C. 407, 412, 605 S.E.2d 540, 542 (2004); State v. Forbes, 296 S.C. 344, 345, 372 S.E.2d 591, 592 (1988); State v. Pressley, 292 S.C. 9, 10, 354 S.E.2d 777, 777 (1987); State v. Mathis, 287 S.C. 589, 593, 340 S.E.2d 538, 541 (1986); State v. Drafts, 288 S.C. 30, 33, 340 S.E.2d 784, 785 (1986); State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983); State v. Gilmore, 396 S.C. 72, 76, 719 S.E.2d 688, 690 (Ct. App. 2011); State v. Fields, 356 S.C. 517, 522, 589 S.E.2d 792, 795 (Ct. App. 2003); State v. Murphy, 322 S.C. 321, 325, 471 S.E.2d 739, 741 (Ct. App. 1996).

survived the codification of the CSC statutes. The Court explained that “the 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.” Id. at 607 n.2, 552 S.E.2d at 729 n.2 (citing State v. Bridgers, 329 S.C. 11, 495 S.E.2d 196 (1997)). Thus, the Court recognized the “anomaly in the law” created by recognizing ABHAN as a lesser included offense of ACSC due to the strict same elements test; however, the Court explained “[t]he common law does not always fit into the neat categories we might prefer.” The Court found “compelling reasons not to abandon [its] longstanding inclusion of ABHAN as a lesser included offense of attempted sexual battery crimes.” Id. at 607, 552 S.E.2d at 729.

In 2010, the South Carolina Legislature codified ABHAN and various degrees of assault and battery. Specifically, the General Assembly explained that ABHAN occurs when a “person unlawfully injures another person” 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(B)(1). Continuing with the statutory scheme, the legislature explained assault and battery in the first degree occurs if (1) a person unlawfully injures another person and (2) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing, with lewd and lascivious intent. S.C. Code Ann. § 16-3-600(C)(1)(a)(i). Similarly, assault and battery in the second degree occurs when a person (1) unlawfully injures another person, or (2) offers or attempts to injure another person with the present ability to do so, and (3) moderate bodily injury to another person could have resulted or (4) the act involves the nonconsensual touching of the private parts of a person, either under or above clothing. S.C. Code Ann. § 16-3-655(D)(1)(b).

A person is guilty of CSCM in the second degree if the person “engages in a sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age.” S.C.

Code Ann. § 16-3-655(B)(1). Sexual battery is “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 when such intrusion is accomplished for medically recognized treatment or diagnostic purposes.” S.C. Code Ann. § 16-3-651(h).

The very language chosen by the legislature in the assault and battery statutory scheme reveals its intent that the assault and battery statutes be considered lesser-included offenses of the criminal sexual conduct offenses. Just as the assault and battery statutes reference private parts, which are defined as the genital area or the buttocks of a male or female or the breasts of a female, the CSC statute defines “intimate parts” as “the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being.” Cf. S.C. Code Ann. § 16-3-600(A)(3) with S.C. Code Ann. § 16-3-651(d). Both reference “lewd and lascivious intent.” Cf. S.C. Code Ann. § 16-3-600(C)(1)(i) with S.C. Code Ann. § 16-3-655(C). This language shows the Legislature’s intent for assault and battery offenses to be lesser-included offenses of CSCM.

Following the codification and in light of the dearth of case law addressing the matter, most judges and practitioners relied upon McAninch’s explanation that where common law ABHAN was a lesser-included offense of CSC in the first degree, “the same should be true when the statutory assault and battery crimes are charged.” William S. McAninch, et al., The Criminal Law of South Carolina, 239-240 (6th ed. 2013).² McAninch explained that “[w]ith the new statutory offenses, it

² It is undersigned counsel’s belief that over the last eight years numerous criminal sexual conduct cases have been resolved through guilty pleas to statutory assault and battery offenses without the state re-indicting the defendants or the trial courts obtaining waivers of presentments of indictments to the grand juries based upon the belief that statutory assault and battery is a lesser-included offense of criminal sexual conduct. The same may be true for trials as judges may have charged assault and battery as lesser-included offenses to juries. If this Court’s opinion remains the same, then those convictions would be void because the trial court lacked

would appear that 1st and 2nd degree assault and battery would more appropriately be lesser-included crimes of CSC in the 1st degree as the definition of each of these crimes includes a nonconsensual sexual touching.” Id. at 247. Further, McAninch, relying upon the analysis in Elliott, supra, noted that “[u]nder the new statutory scheme, it would be that 2nd degree assault and battery is the appropriate lesser-included crime for assault with intent to commit criminal sexual conduct” because “[f]irst degree assault and battery does not seem to cover an assault (or attempt) to touch another person’s private parts, only the actual touching” whereas “[s]econd degree includes the act of touching or an offer or attempt to injure another person by touching them inappropriately.” Id. at 249 (internal quotation omitted).

In rendering its decision, this Court overlooked or misapprehended the case law concerning the Legislature’s assumed familiarity with the Court’s precedents. This Court failed to address Appellant’s argument that the language of the assault and battery statutes includes “sexual touching,” evincing the Legislature’s intent for those offenses to be lesser-included offenses of the criminal sexual conduct offenses.

Additionally, ample evidence in the record required the trial judge to instruct the jury on the lesser-included offenses of assault and battery in the first and second degrees. A jury charge to a lesser included offense is required when the evidence warrants such an instruction. State v. Geiger, 370 S.C. 600, 606, 635 S.E.2d 669, 673 (Ct. App. 2006). South Carolina law mandates a jury instruction on a lesser included offense when there is any evidence from which it could be inferred that the lesser, rather than the greater, offense was committed. State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336, 337 (2002); see also State v. Gourdine, 322 S.C. 396, 398, 472

subject matter jurisdiction to convict the defendants of crimes that were not lesser-included offenses of the offenses charged in the indictment. See State v. Munn, 292 S.C. 497, 357 S.E.2d 461 (1987).

S.E.2d 241, 241 (1996). In other words, the evidence must allow “a rational inference” that the defendant committed the lesser offense. Geiger, 370 S.C. at 607, 635 S.E.2d at 673. In determining whether such a rational inference exists the court must examine the totality of evidence. Id. As this Court explained in State v. Patterson, 337 S.C. 215, 233, 522 S.E.2d 845, 854 (Ct. App. 1999), “[i]n order to justify a charge of a lesser included offense, the evidence must be capable of sustaining either the greater or the lesser offense, depending on the jury’s view of the facts.”

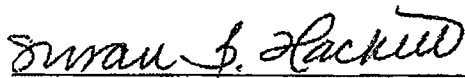
“[I]n the context of a trial court’s decision not to charge a requested lesser included offense, [the appellate court] review[s] the trial court’s decision de novo.” The appellate court must reverse and remand for a new trial “if the evidence in the record is such that the jury could have found the defendant guilty of the lesser offense instead of the crime charged.” State v. Gilmore, 396 S.C. 72, 77, 719 S.E.2d 688, 690-691 (Ct. App. 2011). This Court recognized “three types of cases in which the evidence can support an inference,” one of which occurred when “there is evidence the defendant committed a nonsexual ABHAN, such as in a fight and in addition to evidence to support CSC, there is evidence the two never had sex.” Id. at 77-78, 719 S.E.2d at 691 (citing State v. Lambright, 279 S.C. 535, 537, 309 S.E.2d 7, 8 (1983)).

The evidence presented clearly supported jury instructions on the lesser-included offenses of assault and battery in the first and second degrees. In order for the jury to convict Appellant of CSCM in the second degree, the jury was required to find an “intrusion” of Minor 1’s vagina by Appellant’s finger. However, the testimony regarding any “intrusion” was contradictory. Minor 1 testified there had been an intrusion, but she told the forensic interviewer that she did not understand the question when posed. Also, Minor 1’s mother told the 911 operator there had been no penetration. Additionally, Appellant’s testimony indicated a touching only – no intrusion, no

penetration. Thus, the evidence before the jury was susceptible to more than one interpretation – a touching only or an intrusion. Thus, Appellant was entitled to an instruction on a lesser-included offense to cover the evidence presented – that he had only touched Minor 1.

Pursuant to Rule 221(a), SCACR, Appellant respectfully requests this Court rehear the matter to address the significant points overlooked or misapprehended by this Court in reaching its conclusion.

Respectfully Submitted,



SUSAN B. HACKETT
Appellate Defender

This 8th day of October, 2018.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

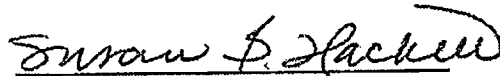
V.

BENJAMIN CERVANTES HERNANDEZ,

APPELLANT


CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Benjamin Cervantes Hernandez, #367274, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 8th day of October, 2018.



Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 8th day of October, 2018.

 (L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023

STATE OF SOUTH CAROLINA
IN THE 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 SECOND 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 asked each of the parties to file a return to the other's petition. Subsequently, on September 26, 2018, this Court denied both parties' petitions for rehearing, withdrew its previous opinion, and filed a substituted opinion that was virtually identical to the withdrawn opinion. Through the substituted opinion, this Court again correctly affirmed Hernandez's conviction for the same reasons it had previously done so while

also omitting a footnote that could have potentially been misconstrued. At that point, Hernandez again petitioned this Court for rehearing by filing a petition that was virtually identical to his original petition, and this Court again asked the State to file a return to Hernandez's petition. For the following reasons, Hernandez's petition should once again 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

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. (2nd Pet. for Reh. pp. 1-9).

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 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[.]”); King, 412 S.C. at 409, 772 S.E.2d at 192 (instructing 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

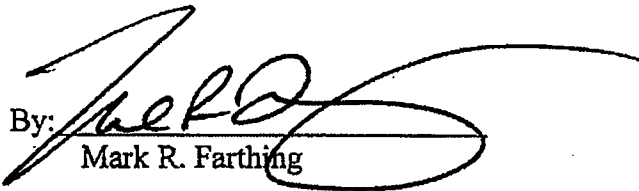
² Notably, the illogical and inconsistent nature of the common law tradition that treated common law assault and battery of a high and aggravated nature as a lesser-included offense of criminal sexual conduct offenses very well might have been the precise reason why the legislature elected *not* to treat 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

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 once again deny Hernandez’s petition for rehearing and again uphold its correct decision affirming Hernandez’s conviction.

Respectfully submitted,

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November 5, 2018

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.”).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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BENJAMIN CERVANTES HERNANDEZ,


Appellant.

PROOF OF SERVICE

I, Destiny Blue, certify I have served the within Return to Appellant's Second 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 5th day of November, 2018.


DESTINY BLUE
Legal Assistant
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Columbia, SC 29211
(803) 734-3727

The South Carolina Court of Appeals

The State, Respondent,

v.

Benjamin Cervantes Hernandez, Appellant.

Appellate Case No. 2016-000612

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.
Paul W. Brown J.
Man Liu J.

Columbia, South Carolina

cc:
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Mark Reynolds Farthing, Esquire
Isaac McDuffie Stone, III, Esquire
The Honorable John C. Hayes, III

FILED
December 13, 2018