

No.

IN THE
SUPREME COURT OF THE UNITED STATES

DEON DINKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Whether the *mens rea* element of general intent can transform the *actus reus* elements of an otherwise nonviolent crime into a violent felony under the Armed Career Criminal Act (“ACCA”), 18 U.S.C. §924(e).
- II. Whether an offense that can be committed recklessly qualifies as a violent felony under the 18 U.S.C. §924(e), the Armed Career Criminal Act (“ACCA”), a question left open by this Court’s *Leocal v. Ashcroft*, 543 U.S. 1 (2004) and *Voisine v. United States*, 136 S.Ct. 2272 (2016) opinions and which has created a split among the circuits.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Deon Dinkins, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in Case No. 16-4795, entered on December 12, 2017.

OPINION BELOW

The Fourth Circuit panel issued its unpublished opinion on December 12, 2017, reversing the judgment of the United States District Court for the District of South Carolina. This opinion is reported as *United States v. Dinkins*, -- Fed. Appx. --, 2017 WL 6371255 (4th Cir. 2017) and is attached as App. 1A-9A. The order of the district court granting Dinkins' relief is reported as *United States v. Dinkins*, 213 F. Supp. 3d 784 (D.S.C. 2016) and is attached as App. 10A-14A.

JURISDICTION

The Fourth Circuit Court of Appeals issued its opinion and entered its judgment on December 12, 2017. App. 1A-9A and App. 15A. Dinkins did not file a petition for rehearing and rehearing *en banc* with the circuit court. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924 (e)(1):

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection - -

* * *

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

STATEMENT OF THE CASE

On August 17, 2011, Dinkins was charged with being a felon in possession of a firearm and ammunition under 18 U.S.C. §922(g)(1), §924(a)(2), and §924(e), to which he ultimately pled guilty. JA 3, ECF 2; JA 6, ECF 50-52; and JA 15-16.¹

Pursuant to 18 U.S.C. §924(e), Dinkins was subject to a mandatory minimum sentence of 15 years based on two drug convictions and a prior conviction for South Carolina assault and battery with intent to kill (“ABIK”). JA 106. On April 25, 2012, Dinkins was sentenced to 180 months and five years of supervised release. JA 7, ECF 61 and 63.

After this Court issued *Johnson v. United States*, 135 S. Ct. 2551 (2015), Dinkins was permitted to file a successive 28 U.S.C. §2255 motion on June 2, 2016. JA 12, ECF 115 and 116. In his §2255 motion, Dinkins argued that ABIK was not a violent felony because the elements did not involve the use, attempted use or threatened use of violent physical force. JA 105-09.

Under state law, ABIK is assault and battery of a high and aggravated nature (“ABHAN”), plus the *mens rea* element of malice aforethought. *State v. Sussewell*, 146 S.E. 697, 697 (S.C. 1929) (“[T]he essential difference between the crime of assault and battery with intent to kill and assault and battery of a high and aggravated nature is that the assault and battery with intent to kill contains the element of

¹ Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. See Joint Appendix, *United States v. Dinkins*, No. 16-4795 (4th Cir. filed Mar. 7, 2017) at ECF 19 and 20.

malice and the assault and battery of high and aggravated nature is without malice.”). ABHAN is distinguished from ABIK based on the intent to kill, which may be inferred from use of a deadly weapon, the injuries inflicted, or the defendant’s purpose. *State v. Dennis*, 742 S.E.2d 21, 27 (S.C. Ct. App. 2013) (citations omitted).

In his §2255 motion, Dinkins asserted that the elements of ABHAN, which the Fourth Circuit previously held were not violent, and malice aforethought, which comprise the ABIK offense, are outside the scope of the force clause of the ACCA. JA 106-08; see *United States v. Hemingway*, 734 F.3d 323 (4th Cir. 2013).

Over the government’s opposition, the district court granted Dinkins’ §2255 motion, resentencing him to time served and three years of supervised release. JA 154-158. The district court held that ABIK is not a violent felony because its *actus reus* elements mirror ABHAN and the *mens rea* element of intent to kill and malice do not transform the crime into a violent felony. App. 13A. The district court held “South Carolina courts have recognized that assault and battery, even ‘of a high and aggravated nature,’ ‘may occur even though no real force is employed against the victim.’” *Dinkins*, 213 F. Supp. 3d at 788 (quoting *State v. Primus*, 564 S.E.2d 103, 106, n.4 (S.C. 2002) (overruled on other grounds)). The additional *mens rea* element in ABIK, as demonstrated by the South Carolina jury instructions, requires “no additional level of force” than that required for an ABHAN conviction. *Id.* at 789.

The “operative element of action, assault and battery, is the same” for ABIK and ABHAN. *Id.*

The government appealed. In part, the government urged the Fourth Circuit to reject the elements-based categorical approach long-established by this Court. Appellant’s Brief, *United States v. Dinkins*, Fourth Circuit Case No. 16-4795 (4th Cir. filed Mar. 7, 2017) at pp. 12-13 (“That element-by-element analysis [used by the district court] was fundamentally flawed.” “ABIK must be viewed as a whole, not, as the district court reasoned, element-by-element.”).

The government’s position is clearly contrary to this Court’s established categorical analysis. This Court adopted the categorical approach to analyze §924(e), noting that the statute “most likely refers to the elements of the statute of conviction, not to the facts of each defendant’s conduct.” *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). This element-based analysis has been affirmed time and again by this Court. *See Descamps v. United States*, 570 U.S. 254, 261-63 (2013) (quoting *Taylor*, 495 U.S. at 600) (To determine if a prior conviction is an ACCA predicate, “[s]entencing courts may ‘look only to the statutory definitions’ - *i.e.* the elements” and emphasized the “elements-based rationale” of the categorical and modified categorical approaches) and *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016) (Courts match the elements of the offense of conviction with the generic crime to determine if it is an ACCA predicate, disregarding the defendant’s conduct.) “The

key, we [this Court] emphasized, is elements, not facts”, which is “the categorical approach’s central feature.” *Descamps*, 570 U.S. at 261 and 263.

In fact, in *Descamps*, this Court rejected the appellate court’s “‘modified factual’” approach, where the appellate court had applied the modified categorical approach to an indivisible statute. *Id.* at 266-67. There, the appellate court held it could “‘conside[r] to some degree the factual basis for the defendant’s conviction” and “‘the particular acts the defendant committed.”’ *Id.* at 265 (citation omitted). This Court soundly rejected this fact-based approach, holding the analysis “subverts” this Court’s prior authority and “threatens to undo all its [the categorical approach’s] benefits.” *Id.* at 267.

However, the Fourth Circuit adopted the government’s position, rejecting the clearly established element-by-element analysis. The Fourth Circuit reversed the district court, holding that ABIK is a violent felony even though it held that the individual elements of ABIK are not violent. App. 6A-7A. ABIK has three elements: assault, battery and the *mens rea*. App. 6A. The Fourth Circuit acknowledged that that the assault and battery elements of ABIK do not require violent physical force required to be an ACCA predicate. App. 6A.

Turning then to the *mens rea* element, the Fourth Circuit stated: “To be sure, a person’s intent to injure another grievously does not necessarily mean that the person has ‘used’ violent physical force.” App. 7A. The Fourth Circuit nonetheless

held that the *mens rea* element transformed ABIK into a violent felony, as it requires a prosecutor “to prove that the defendant possessed the general intent to kill the victim, meaning that he intentionally performed an act capable of causing death, even if he did not intend for the victim to die.” App. 7A (citing *State v. Foust*, 479 S.E.2d 50, 51-52 (S.C. 1996)).

Not only is this a misstatement of the South Carolina case cited, it is directly contrary to this Court’s law on general intent, which requires only “proof of knowledge with respect to the *actus reus* of the crime.” *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)). Similarly, South Carolina’s law on ABIK refutes the Fourth Circuit’s interpretation of the ABIK *mens rea* element. *See State v. Glover*, 4 S.E. 564, 566 (S.C. 1888) (if there was an intent to kill and actions calculated to accomplish that intent, then ABIK is accomplished even if the “act done by . . . [the defendant] fell short of effecting her intent”). Even if it is impossible for the act to cause the intended result, an ABIK conviction will stand because, under South Carolina law, it is “wholly immaterial to inquire whether the drug was in fact poisonous, or what quantity would be sufficient to endanger life, or cause grievous bodily harm.” *Id.*

In other words, the Fourth Circuit’s interpretation of *Foust* is erroneous, because general intent, as an element of ABIK, does not require the completion of acts “capable of causing death” as stated in the *Dinkins* opinion. App. 7A. Instead,

the *mens rea* element only requires that the defendant desires a certain result, not that the result can be accomplished. South Carolina requires some intent, such as a “general malignant recklessness of the lives and safety of others,” which “does not necessarily import ill-will toward the individual injured.” *Foust*, 479 S.E.2d at 51, n.2 and 52. The Fourth Circuit erroneously concluded that even when a defendant convicted of ABIK committed “the lowest degree of assault and battery – a mere offensive touching – the State still had to prove that the defendant attempted or threatened **to cause** the more severe kind of bodily injury imagined by the force clause.” App. 8A. This is also an inaccurate representation of South Carolina’s ABIK offense, as the key to the *mens rea* element of intent is what the defendant subjectively wants, not what actions the defendant actually takes.

In addition to the distortion of South Carolina law, the Fourth Circuit’s analysis and conclusion conflicts with this Court’s authority. Based on this Court’s precedent, general intent requires only that the defendant intended to perform the *actus reus* elements, which, in this case, is the nonviolent offense of ABHAN. *Carter*, 530 U.S. at 269 and *Hemingway*, 734 F.3d 323. Like this Court’s interpretation of general intent, South Carolina precedent makes it clear that ABIK is complete even if it is impossible for the defendant to accomplish his intent through completion of the *actus reus* elements. *Glover*, 4 S.E. at 566.

Additionally, the Fourth Circuit, instead of analyzing the *mens rea* element to determine if it was violent, conflated the *mens rea* element with causation of the

defendant's conduct and with the *actus reus* elements. App. 7A-8A. The Fourth Circuit rejected the elements analysis required by this Court, by acknowledging that all the elements of ABIK are nonviolent, but nonetheless reading an attempt or threat to cause injury into the offense of conviction. 18 U.S.C. §924(e)(2)(B)(i) (requiring a violent felony to have “as an **element** the use, attempted use, or threatened use of physical force”) (emphasis added). It also erroneously equated the *mens rea* element with an attempt or threat to cause injury, when, in fact, the intent to kill is a desire contained completely within the defendant's brain. The Fourth Circuit's diversion from an analysis of the elements is in conflict with this Court's precedent on the categorical approach. *Descamps*, 570 U.S. 254.

To support its position, the Fourth Circuit relied on cases from the First and Sixth Circuits, both of which involved crimes which had specific intent *mens rea* elements. App. 8A (citing *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017) and *United States v. Raybon*, 867 F.3d 525 (6th Cir. 2017)). The offense at issue in *Edwards*, 857 F.3d at 424, had the additional element of the defendant being armed with a dangerous weapon. Contrary to Dinkins' position, Edwards urged the appellate court to consider only that simple assault could not be committed nonviolently, while ignoring the other elements. *Edwards*, 857 F.3d at 424-25. The First Circuit rejected Edwards' argument because it indicated it must consider all

the elements. *Id.* Here, Dinkins argued that none of the elements were violent, a proposition with which the Fourth Circuit agrees. App. 6A-7A.

The Fourth Circuit also rejected a state court case, *Glover*, 4 S.E. 564, which involved an ABIK conviction where the conduct involved a woman administering poison to an infant. The Fourth Circuit claimed that it was not clear this case involved an ABIK conviction, although the text unequivocally states: “We must regard this as a conviction under the first count, charging an assault and battery with intent to kill.” App. 7A, n.4 and *Glover*, 4 S.E. at 565. Next, the Fourth Circuit held that, even if *Glover* is an ABIK case, poisoning is violent physical force under *United States v. Castleman*, 134 S.Ct. 1405, 1411 and 1415 (2014). App. 7A, n.4. However, *Castleman* explicitly involved common law domestic violence and reaffirmed that the common law definition of force applied in *Castleman* had no application to the ACCA definition of violent felony. *Castleman*, 134 S.Ct. at 1411 and 1415. Furthermore, during oral argument, the Fourth Circuit specifically foreclosed the government’s argument about *Castleman*, on the basis that *Glover* involved the direct application of force, since the defendant had to touch the infant to open her mouth to administer the poison, which clearly demonstrates that ABIK does not require violent physical force under South Carolina law. *See Glover*, 4 S.E. at 567 (“their [the jury’s] common sense would force them to the conclusion that some physical force must have

been exerted to compel so small a child to drink such a nauseous drug.”). *Glover* concluded that even if the substance administered to the infant could not have accomplished the defendant’s intent – death of the infant – the crime of ABIK was complete. *Glover*, 4 S.E. at 566.

Finally, in Dinkins’ brief, he pointed out that South Carolina sanctions an ABIK conviction based on negligent and reckless conduct. Appellee’s Brief, *United States v. Dinkins*, No. 16-4795 (4th Cir. filed Apr. 25, 2017) at pp. 22-23 of 27. The government fully responded, citing mainly to secondary sources and federal cases to argue that reckless behavior satisfies the force clause. Appellant’s Reply Brief, *United States v. Dinkins*, No. 16-4795 (4th Cir. filed May 15, 2017) at pp. 10-13 of 15. After oral argument and before the Fourth Circuit issued its opinion, Dinkins filed a letter pursuant to Fed. R. App. Pr. 28(j), referencing the recent South Carolina case, *State v. King*, 810 S.E.2d 18, 2017 WL 4800004, *4-*6 (S.C. 2017). Letter, *United States v. Dinkins*, No. 16-4795 (4th Cir. Nov. 1, 2017). The South Carolina Supreme Court reviewed the history of ABIK, making it abundantly clear that ABIK could be accomplished by a *mens rea* of recklessness. *King*, 810 S.E.2d at *4-*6. The Fourth Circuit did not address this argument in its opinion.

Almost three months after it decided *Dinkins*, the Fourth Circuit issued *United States v. Middleton*, 883 F.3d 485, 498-500 (4th Cir. 2018) (Floyd, J., joined by Harris, J., concurring), in which the concurrence, for a majority of the court, concluded that

“the word ‘use’ in the ACCA force clause requires a higher *mens rea* than recklessness”. Since this issue was briefed in *Dinkins*, the Fourth Circuit should have reached a contrary conclusion – that ABIK is not a violent felony because it can be committed by mere recklessness.² See Appellee’s Brief, *United States v. Dinkins*, No. 16-4795 (4th Cir. filed Apr. 25, 2017) at p. 23 of 27; Appellant’s Reply Brief, *United States v. Dinkins*, No. 16-4795 (4th Cir. filed May 15, 2017) at pp. 10-13 of 15; and Letter, *United States v. Dinkins*, No. 16-4795 (4th Cir. filed Nov. 1, 2017).

The issue of whether recklessness satisfies the use of force clause in the ACCA and other similar provisions has caused a widening circuit split. It is an issue that is frequently raised in the lower courts and requires guidance from this Court to settle the issue.

This petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari because the Fourth Circuit relied on the *mens rea* element of general intent, an element that lacks violent physical force, to hold that South Carolina ABIK is a violent felony, when the *actus reus* elements likewise lack violent physical force as required by this Court. The Fourth Circuit’s decision is in conflict with this Court’s previous cases concerning *mens rea* and violent

² Given the decision in *Middleton*, 883 F.3d 485, which included one panel member who was also on Dinkins’ panel, it is appropriate for this Court to remand for reconsideration since the recklessness issue was raised, but not addressed, in *Dinkins*. See *United States v. Newbold*, 791 F.3d 455 (4th Cir. 2015) (referencing that this Court had granted, vacated and remanded a case to the Fourth Circuit based on subsequent Fourth Circuit authority).

felonies. This is an important issue that should be decided by this Court, as it is frequently addressed by the lower courts in the context of whether or not state offenses qualify as violent felonies or crimes of violence. *See, e.g., Raybon*, 867 F.3d 525; *Edwards*, 857 F.3d 420; *United States v. Townsend*, -- F.3d --, 2018 WL 1547107 at *4 (4th Cir. Mar. 30, 2018) (considering whether the intent to kill is use of force within the ACCA) .

Additionally, the Fourth Circuit avoided answering the question about whether ABIK can be a violent felony since the offense can be accomplished by recklessness. There is a deep circuit split about whether recklessness can be use of force, a question left open by *Leocal*, 543 U.S. 1, and, more recently, *Voisine*, 136 S.Ct. 2272. This case presents an ideal vehicle for resolving the dispute, as the state case law makes it very clear that ABIK can be accomplished with recklessness.

I. A MENS REA ELEMENT OF GENERAL INTENT IS NOT VIOLENT AND CANNOT TRANSFORM NONVIOLENT ACTUS REUS ELEMENTS INTO VIOLENT FELONIES

Criminal liability is generally based on both “an evil-meaning mind” and “an evil-doing hand.” *Morisette v. United States*, 342 U.S. 246, 251 (1952). The mental element instinctively relates to “punishment for a harmful act.” *Id.* at 250-51. Regardless of the level, the *mens rea* relates to the result or consequence of the defendant’s actions, not how the result is accomplished. *Voisine*, 136 S.Ct. at 2278 (citations omitted) (The *mens rea* involves a “state of mind respecting the act’s

consequences”, including that intentionally or purposefully means “to have that result as a ‘conscious object.’”).

This Court has explained in great detail that violent felony in the ACCA context requires “*violent* force – that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010) (emphasis in original) (hereinafter “*Johnson 2010*”). Violent felonies involve “a category of violent, active crimes”. *Id.* This means “force exerted by and through concrete bodies,” not intellectual or emotional force. *Id.* at 138.

In *Leocal*, 543 U.S. at 9, this Court held that the term “use” in the ACCA “requires active employment.” (quoting *Bailey v. United States*, 516 U.S. 137, 145 (1995)). As related to the *mens rea* component of a criminal offense, use “suggests a higher degree of intent than negligent or merely accidental conduct.” *Leocal*, 543 U.S. at 9-10 (citations omitted). However, this leaves open the question whether the *mens rea* element alone can transform the otherwise nonviolent *actus reus* elements into a violent felony. *Id.* at 13.

The *mens rea* element of a crime, including South Carolina ABIK, is, in fact, analogous to the unconstitutional residual clause of the ACCA, in that the residual clause defined a violent felony based on the results or consequences of the defendant’s actions. *See* 18 U.S.C. §924(e)(2)(B)(ii) (“involves conduct that presents a serious potential risk of physical injury to another”). As noted by Justice Alito in

addressing the defendant’s argument that he did not intend to make a threat, he observed: “Whether or not the person making the threat intends to cause harm, the damage is the same.” *Elonis v. United States*, 135 S.Ct. 2001, 2016 (2015) (Alito, J. concurring in part and dissenting in part). This shows exactly why ABIK – and any other crime that includes nonviolent *actus reus* elements combined with any *mens rea*, no matter how heightened – is not a violent felony. Regardless of the intent in the mind of a person committing ABHAN, a nonviolent offense under South Carolina law, the damage remains exactly the same. *Id.* In other words, under South Carolina law, when a person engages in offensive touching of a minor, even if the person intends to kill the minor, the conduct itself remains nonviolent and lacks the force required to qualify the offense as a violent felony. While the *mens rea* is an element that must be proven, the only way the intent contained in someone’s brain can be deemed violent is by looking at the underlying conduct – i.e. facts – that are used to prove the defendant’s state of mind. *See, e.g., Foust*, 479 S.E.2d at 52, n.4 (“‘intent may be shown by acts and conduct from which a jury may naturally and reasonably infer intent,’ such as the instrument used, purpose to be accomplished and resulting wounds or injuries). This review of facts is clearly precluded by this Court’s precedent. *Descamps*, 570 U.S. 254 (quoting *Taylor*, 495 U.S. 575) (In applying the formal categorical approach, the courts must look at the elements, “not ‘to the particular facts underlying those convictions.’”).

For example, in *Stevenson v. State*, 516 S.E.2d 434 (S.C. 1999), the defendant was charged with two counts of ABIK and two counts of resisting arrest, but the jury convicted him of two counts of the lesser included offense ABHAN and the resisting arrest counts. The jury necessarily found that the government did not prove the *mens rea* of intent to kill required for an ABIK conviction, although the underlying conduct for either an ABIK or ABHAN conviction was identical. Had the government proven the intent to kill, the evidence likely would have been through matters extraneous to the force used against the victim, such as an admission by the defendant when interrogated or by testimony of a witness who heard the defendant express the requisite intent. Proof of intent to kill simply does not change the amount of force used against the victim.

In another state case involving an ABHAN conviction, the defendant followed a nurse in her car as she left work, honking, waving, and flashing his lights until the victim pulled over. *State v. Williams*, 185 S.E.2d 529 (S.C. 1971). The defendant came to the victim's window, said "I want you" and grabbed at her before she sped off. *Id.* The defendant was convicted of ABHAN. *Id.* at 531. If the prosecution could have established intent to kill, the *mens rea* element would likely have been proved through additional facts, such as mere words expressed by the defendant of his intent. No proof of additional force against the victim separates ABHAN from ABIK. Often the intent to kill can be established by extraneous evidence unrelated to the force used against the person of another.

As this Court has defined it, the *mens rea* element of an offense “is necessary to separate wrongful conduct from ‘otherwise innocent conduct.’” *Carter*, 530 U.S. at 269 (quoting *X-Citement Video, Inc.*, 513 U.S. at 72). The *mens rea* can be general intent or specific intent. *Id.* General intent crimes require only “proof of knowledge with respect to the *actus reus* of the crime.” *Id.* In other words, “a defendant generally must ‘know the facts that make his conduct fit the definition of the offense’” even if he is ignorant that the facts formulate a crime. *Elonis*, 135 S.Ct. at 2009 (quoting *Staples v. United States*, 511 U.S. 600, 608, n.3 (1994)).

ABIK encompasses the elements of South Carolina ABHAN, a crime the Fourth Circuit has previously held is not violent. *Hemingway*, 734 F.3d 323 and *United States v. Montes-Flores*, 736 F.3d 357, 369 (4th Cir. 2013). The Fourth Circuit’s position that a *mens rea* element of an offense, which is not violent in and of itself, can somehow transform the other nonviolent elements of the offense into a violent felony, is erroneous. The Fourth Circuit subverted this Court’s categorical approach, by taking a nonviolent *mens rea* element, which is generally proven from the facts of the specific case, and applied it to the *actus reus* elements, also a nonviolent in nature, to reach the conclusion that an offense is violent. However, as this Court has held many times, one of the elements of the crime must, by its nature, involve the use, threatened use or attempted use of violent physical force. *Johnson 2010*, 559 U.S. at 136-38 and 142. ABIK does not consist of an element that involves the use, threatened use or attempted use of violent physical force.

South Carolina ABIK requires proof of no more force than is necessary for ABHAN, an offense the Fourth Circuit held was not violent in *Hemingway* and *Montes-Flores*.³ A review of South Carolina cases shows the flawed reasoning of the Fourth Circuit. “The defendant’s mental state, or mens rea . . . is contained within the defendant’s brain when he commits the act.” *State v. Fennell*, 531 SE2d 512, 515 (S.C. 2000). Therefore, regardless of the *mens rea* requirement, the amount of force used will often be exactly the same because the intent is completely within the defendant’s mind. Intent to kill cannot be physical “force exerted by and through concrete bodies” as required by this Court. *Johnson 2010*, 559 U.S. at 139.

Intent is shown by extraneous facts, such as if the prosecution presented a witness who heard the defendant say he would kill the victim or if the defendant admitted during questioning that he had the requisite intent. In South Carolina, the *mens rea* element of intent to kill also may be inferred from use of a deadly weapon, the injuries inflicted or the defendant’s purpose. *Dennis*, 742 S.E.2d at 27. Thus, if the Fourth Circuit’s decision that an offense containing only nonviolent elements can be transformed into a violent felony based on the *mens rea* element, this Court’s

³ Historically, assault and battery in South Carolina can be accomplished with *de minimis* force. Assault and battery, even of a high and aggravated nature, “may occur even though no real force is employed against the victim.” *Primus*, 564 S.E.2d at 106 n.4 (overruled on other grounds regarding sufficiency of indictment). Assault and battery means “any touching of the person of an individual in a rude or angry manner, without justification.” *State v. LaCoste*, 553 S.E.2d 464, 471 (S.C. Ct. App. 2001) (quoting *State v. Mims*, 335 S.E.2d 237, 237 (S.C. 1985)). “Violence [as included in the definition of assault and battery] does not necessarily import serious injury.” *State v. German*, 44 S.E.2d 840, 841 (S.C. 1947).

categorical approach will have been eviscerated. The Fourth Circuit’s conclusion allows the *facts* of what the defendant actually did to establish that the defendant used the requisite force. The facts used to establish the *mens rea* element of intent to kill cannot transform the nonviolent *actus reus* elements into an offense involving violent physical force. Allowing the facts that can establish the requisite *mens rea* to be used to transform otherwise nonviolent conduct into a violent felony is contrary to this Court’s precedent. *Mathis*, 136 S. Ct. at 2251 (internal citation omitted) (“How a given defendant actually perpetrated the crime – what we have referred to as the ‘underlying brute facts or means’ of commission . . . makes no difference”). “‘Elements’ are the ‘constituent parts’ of a crime’s legal definition—the things the prosecution must prove to sustain a conviction.” *Id.* at 2248 (internal quotation marks and citations omitted). In contrast, facts “are mere real-world things—extraneous to the crime’s legal requirements. . . . They are circumstances or events having no legal effect or consequence. In particular, they need neither be found by a jury nor admitted by a defendant.” *Id.* (internal quotation marks, alterations, and citations omitted).

The Fourth Circuit’s position transforms offenses containing only nonviolent elements into violent felonies, based on nothing more than the subjective intent in the defendant’s brain and on the facts specific to each individual case used to prove the defendant’s intent. *Fennell*, 531 SE2d at 515. This is true even when the actions taken cannot accomplish the intent desired by the defendant. *Glover*, 4 S.E. at 566 (If there was an intent to kill “accompanied by an act which . . . [the defendant]

believed was calculated to effect her intent, and the fact that the act done by . . . [the defendant] fell short of effecting her intent cannot affect the question.”).

In sum, the *elements* of ABIK do not include the use, attempted use or threatened use of violent force. ABIK consists of the nonviolent offense of ABHAN with malice. ABIK is a general intent crime which does not require violent physical force. The Fourth Circuit’s rejection of the established elemental analysis to determine that the nonviolent elements of ABIK were transformed into a violent felony subverts this Court’s precedent. Dinkins urges this Court to grant certiorari on this important issue to ensure the correct categorical analysis is applied in this and similar cases.

II. THIS COURT SHOULD ADDRESS WHETHER OFFENSES THAT CAN BE COMMITTED RECKLESSLY QUALIFY AS VIOLENT FELONIES TO SETTLE THE QUESTION LEFT OPEN BY *LEOCAL* AND CURRENTLY DIVIDING THE CIRCUITS

South Carolina law holds that ABIK can be committed recklessly. The day prior to oral argument in this case, the South Carolina Supreme Court issued an opinion that detailed the history of ABIK, which has now been abolished in South Carolina. *King*, 810 S.E.2d 18, 2017 WL 4800004. The state Supreme Court recognized that ABIK was a general intent crime. *Id.* at *6. The state also recognized that an ABIK conviction could stand based on a defendant’s reckless use of his car. *Id.* (citing *State v. Wilds*, 584 S.E.2d 138 (S.C. Ct. App. 2003)).

This Court specifically left open the question of whether laws that required only reckless use of force would qualify under the crime of violence definition in 18

U.S.C. §16. *Leocal*, 543 U.S. at 13. However, after *Leocal*, numerous circuits addressed whether reckless conduct can satisfy the definition of use of force, with the majority holding that recklessness is insufficient. *See, e.g., United States v. Duran*, 696 F.3d 1089, 1093 (10th Cir. 2012) (noting precedent unequivocally holding that the text of U.S.S.G. §4B1.2 only reaches purposeful or intentional behavior; therefore, crimes that can be committed by reckless conduct are not categorically crimes of violence); *United States v. Torres-Villalobos*, 487 F.3d 607, 615-16 (8th Cir. 2007) (holding that “the ‘use of force,’ as *Leocal* interpreted that phrase, is not an element of a second-degree manslaughter conviction” under §16 because the statute could be satisfied by a *mens rea* of recklessness); *United States v. Otero*, 502 F.3d 331, 335 (3d Cir. 2007) (citation omitted) (holding that “crimes of violence” under USSG §2L1.2 are limited to those offenses committed through intentional use of force versus reckless or grossly negligent conduct); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1127-32 (9th Cir. 2006) (en banc) (“[T]he reckless use of force is ‘accidental’ and crimes of recklessness cannot be crimes of violence.”); and *Garcia v. Gonzales*, 455 F.3d 465, 468-69 (4th Cir. 2006) (reckless assault is not “crime of violence” under §16(a) because it “does not contain an element that there be the intentional employment of physical force against a person or thing”). This Court recognized that most courts of appeal have held post-*Leocal* that offenses that can be committed recklessly do not involve use of force. *Castleman*, 134 S.Ct. at 1414, n.8.

After *Leocal*, this Court addressed whether a domestic violence offense with a recklessness *mens rea* could qualify as a misdemeanor crime of domestic violence under 18 U.S.C. §922(g). *Voisine*, 136 S.Ct. at 2277. This Court very clearly distinguished the difference between misdemeanor crimes of violence and crimes of violence under, for example, 18 U.S.C. §16(b). *Id.* at 2280, n.4. As distinguished from the misdemeanor domestic violence convictions, 18 U.S.C. §16(b) and similar statutes have “differences in their contexts and purposes, and we do not foreclose that possibility with respect to their required mental states.” *Id.* However, since *Voisine*, several circuit courts have reversed their prior decisions regarding reckless conduct qualifying as use of force under the ACCA and guidelines, resulting in a circuit split that is ripe for this Court to review.

The District of Columbia, Fifth, Sixth, Tenth and, in at least one opinion, the Eighth Circuits have now concluded, post-*Voisine*, that reckless conduct is sufficient for an offense to be a crime of violence. The Fifth Circuit concluded that Texas assault, which can be accomplished by reckless conduct, was a crime of violence under the force clause of the sentencing guidelines. *United States v. Howell*, 838 F.3d 489, 499-503 (5th Cir. 2016). The Eighth Circuit held that a drive by shooting statute that required only a recklessness *mens rea* nonetheless qualified as an ACCA predicate

under the force clause. *United States v. Fogg*, 836 F.3d 951, 956 (8th Cir. 2016). The Eighth Circuit rested its decision on its interpretation that “use” of force in the ACCA requires only a substantial likelihood the act will cause harm, not a practical certainty that it will cause harm. *Id.* (citing *Voisine*, 136 S.Ct. at 2279).

The Sixth Circuit also held that *Voisine* now dictates that reckless conduct can comprise a crime of violence for the career offender enhancements. *United States v. Verwiebe*, 874 F.3d 258, 262 (6th Cir. 2017). The Sixth Circuit, in a subsequent published opinion, was compelled, based on *Verwiebe*, to hold that Tennessee aggravated assault, which can be committed recklessly, was a crime of violence. *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017), *petition for cert. filed*, No. 17-7613 (U.S. Jan. 24, 2018).⁴ However, *Harper* outlined strong disagreement with *Verwiebe*, noting that the guidelines provision, unlike the provision in *Voisine*, requires the use of force against the person of another. *Id.* at 331. Because this type of force must be volitional, recklessness is insufficient to qualify as a crime of violence. *Id.* at 331-32.

The Tenth Circuit has also noted in *dicta* that it interprets *Voisine* to mean that reckless use of force is sufficient for an offense to qualify as a violent felony under the ACCA. *United States v. Hammons*, 862 F.3d 1052, 1056 (10th Cir. 2017). The Tenth Circuit’s rationale is that *Voisine* clarified that the dividing line between violent and nonviolent is not specific intent versus recklessness, but, instead, whether

⁴ A petition for writ of certiorari has been filed with this Court, asking for review of the *Harper* decision. *Harper v. United States*, No. 17-7613 (U.S. filed Jan. 24, 2018). The government has been ordered to respond. *Id.*

the act is volitional rather than involuntary. *Id.* (citing *United States v. Mendez-Henriquez*, 847 F.3d 214, 222 (5th Cir. 2017)). However, the Tenth Circuit previously held that reckless conduct did not meet the similar guideline’s definition of crime of violence based on *Leocal*. *United States v. Zuniga-Soto*, 527 F.3d 1110, 1124 (10th Cir. 2008). The *Hammons* court noted that the question of whether *Voisine* overruled *Zuniga-Soto*’s holding that recklessness does not suffice for use of force was not before the court, so the question went unanswered. *Hammons*, 862 F.3d at 1056, n.4. In *United States v. Pam*, 867 F.3d 1191, 1208 (10th Cir. 2017), the Tenth Circuit applied *Voisine*, holding the “element of recklessness does not bar it from constituting a violent felony under the elements clause of the ACCA”. The District of Columbia circuit court, without any analysis, also summarily noted that *Voisine* stands for the proposition that offenses requiring only recklessness may qualify as crimes of violence. *United States v. Benbow*, 709 Fed. Appx. 25, 27 (D.C. Cir. 2018) (unpublished).

Contrarily, the First, Fourth and, in conflict with another of its opinions, Eighth Circuits have held that recklessness is insufficient to qualify an offense as violent under the force clause of the guidelines or ACCA. *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (reckless assault and battery with a dangerous weapon is not a violent felony under the ACCA force clause because of the lesser the *mens rea* requirement), *Middleton*, 883 F.3d 485 (Floyd, J., concurring, joined by Harris, J.),

and *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017) (assault that can be accomplished by recklessness is not a crime of violence under the force clause of the guidelines). In *Fields*, the Eighth Circuit indicated that the crime – not the mental element – is what matters under its prior cases. *Id.* at 1015. The court also rejected that *Voisine* stands for the proposition that all crimes with a recklessness *mens rea* are violent. *Id.* The court further indicated that *Fogg* was limited to the reckless discharge of a firearm. *Id.*

After the *Dinkins* decision, the Fourth Circuit issued its decision in *Middleton*, 883 F.3d 485, which held that South Carolina involuntary manslaughter is not a violent felony. Although the opinion did not address that involuntary manslaughter could be committed recklessly, the concurrence, in which the majority of the panel joined, held that an offense that can be committed with a *mens rea* of recklessness is insufficient to qualify as an ACCA predicate. *Middleton*, 883 F.3d at 493 and 497-500 (Floyd, J., concurring). “The word ‘use’ in the ACCA force clause requires more than a reckless application of force or causation of injury to constitute a ‘use . . . of physical force.’” *Id.* at 497.

The Fourth Circuit also recognized that *Voisine* does not control how the appellate courts “construe the ACCA force clause.” *Id.* at 498. “Given the divergent context of ‘use’ and the divergent purpose of targeting armed career criminals, the ACCA force clause requires a construction different from that of the . . . [misdemeanor criminal domestic violence] force clause.” *Id.* Consistent with the First Circuit’s

Windley, 864 F.3d 36 case and the disagreement expressed in *Harper*, 875 F.3d 329, the court perceived that the phrase “against the person of another” compelled knowing or purposeful, rather than reckless, action. *Id.* at 498-99. Had this view been applied to Dinkins’ case, the outcome would have been different. Indeed, these divergent positions by the circuits result in different outcomes for numerous defendants, depending on where they are prosecuted.

The recklessness issue also has arisen in the Third and Ninth Circuits, but the courts declined to address the issue since the cases were decided on alternate grounds. *United States v. Perez-Silvan*, 861 F.3d 935, 942, n.4 (9th Cir. 2017) (declining to address the government’s argument that reckless conduct can qualify as a crime of violence based on *Voisine*) and *Baptiste v. Attorney General*, 841 F.3d 601, 607, n.5 (3rd Cir. 2016) (noting that adopting *Voisine* would likely “sweep into the provision’s [§16(b)] ambit the pure recklessness and accidental force recklessness crimes,” but indicating skepticism that this Court intended that outcome, given the clear distinction made in *Voisine* between misdemeanor domestic violence convictions and crimes of violence in §16(b)). In other words, whether *Voisine* extends to violent felonies and crimes of violence is a question that repeatedly arises in the circuit courts, with the outcome depending in which circuit the defendant is prosecuted.

The question presented here is of exceptional importance because of its impact on numerous criminal defendants nationally. This Court has repeatedly emphasized

the differences between the common law definition of force applied in *Voisine* and the definition of force applied in the ACCA and guidelines context.

This case provides an ideal vehicle to resolve this ongoing circuit split.

CONCLUSION

For the foregoing reasons, Dinkins respectfully requests that this Court grant certiorari to review the judgment of the Fourth Circuit in this case.

Respectfully submitted.

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