

APPENDIX

- A. Opinion of the United States Court of Appeals for the Fourth Circuit, *United States v. Dinkins*, No. 16-4795 (4th Cir. Filed Dec. 12, 2017).....1A-9A
- B. *United States v. Dinkins*, 213 F.Supp. 3d 784 (D.S.C. 2016).....10A-14A
- C. Judgment, *United States v. Dinkins*, NO. 16-4795 (4th Cir. Filed Dec. 12, 2017) 15A

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UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 16-4795

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

DEON DINKINS,

Defendant - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Columbia. Cameron McGowan Currie, Senior District Judge. (3:11-cr-02061-CMC-1)

Argued: October 26, 2017

Decided: December 12, 2017

Before WILKINSON, MOTZ, and HARRIS, Circuit Judges.

Reversed by unpublished per curiam opinion.

ARGUED: Thomas Ernest Booth, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. Kimberly Harvey Albro, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Columbia, South Carolina, for Appellee. **ON BRIEF:** Beth Drake, Acting United States Attorney, Robert F. Daley, Jr., William K. Witherspoon, Assistant United States Attorneys, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina; Kenneth A. Blanco, Acting Assistant Attorney General, Trevor N. McFadden, Acting Principal Deputy Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant.

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Unpublished opinions are not binding precedent in this circuit.

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PER CURIAM:

Deon Dinkins pled guilty to being a felon in possession of a firearm. The district court found that Dinkins's previous state conviction for assault and battery with intent to kill did not constitute a "violent felony" under the force clause of § 924(e)(2)(B) of the Armed Career Criminal Act ("ACCA"). Accordingly, the court concluded that Dinkins did not merit an enhanced sentence. The Government appeals. Because the force clause of § 924(e)(2)(B) mandates an increased sentence, we reverse.

I.

In 2012, Dinkins pled guilty to being a felon in possession of a firearm. Pursuant to 18 U.S.C. § 924(e)(2)(B), the pre-sentence report ("PSR") recommended imposing an increased sentence because Dinkins had previously been convicted of three predicate offenses, including South Carolina assault and battery with intent to kill ("ABIK"). Dinkins did not object to the PSR, and the district court imposed an enhanced sentence of 180 months imprisonment and five years of supervised release.

In 2015, the Supreme Court held the ACCA residual clause, § 924(e)(2)(B)(ii), void for vagueness. *Johnson v. United States* ("*Johnson I*"), 135 S. Ct. 2551 (2015). Section 924(e)(2)(B) had two subsections, however — the residual clause, § 924(e)(2)(B)(ii), and the force clause, § 924(e)(2)(B)(i) — and the PSR in this case did not specify whether Dinkins's prior conviction for ABIK qualified under only one clause or both.

Dinkins had previously filed, and the district court had dismissed, two motions for collateral review under 28 U.S.C. § 2255. Following the issuance of *Johnson II*, Dinkins

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sought authorization from this court to file a successive § 2255 motion. Because Dinkins “made a prima facie showing that a new rule of constitutional law announced in [*Johnson II*], and held to apply retroactively to cases on collateral review by *Welch v. United States*, 136 S. Ct. 1257 (2016), may apply to his case,” we authorized Dinkins’s successive motion pursuant to 28 U.S.C. § 2244.

On collateral review, the district court found that ABIK did not qualify as a violent felony under the ACCA force clause and so, the court concluded, an enhanced sentence was inappropriate. The Government timely noted this appeal.

II.

“We review de novo whether a prior conviction qualifies as an ACCA violent felony.” *United States v. Doctor*, 842 F.3d 306, 308 (4th Cir. 2016). To qualify as a “violent felony” under the ACCA force clause, the predicate state offense must be “punishable by imprisonment for a term exceeding one year” and have “as an element the use, attempted use, or threatened use of physical force against the person of another.” 18 U.S.C. § 924(e)(2)(B)(i).¹ “[P]hysical force’ means *violent* force — that is, force

¹ The definition of “violent felony” in § 924(e)(2)(B) parallels the definition of “crime of violence” in the force clause of the U.S. Sentencing Guidelines, § 4B1.2(a)(1). Accordingly, courts look to the Supreme Court’s Guidelines “crime of violence” analysis in cases interpreting § 924(e)(2)(B)’s definition of “violent felony.” *See, e.g., United States v. Martin*, 215 F.3d 470, 474 n.4 (4th Cir. 2000).

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capable of causing physical pain or injury to another person.” *Johnson v. United States* (“*Johnson I*”), 559 U.S. 133, 140 (2010).

To determine whether a prior state conviction constitutes a predicate violent felony, we follow the categorical approach.² *Doctor*, 842 F.3d at 308. This approach focuses on “only the elements of the state offense and the fact of conviction, not the defendant’s conduct.” *Id.* We must identify the elements of Dinkins’s state conviction and determine whether the “‘minimum conduct’ required to sustain a conviction for the state crime” falls within the ACCA definition of a “violent felony.” *Id.* (quoting *United States v. Gardner*, 823 F.3d 793, 803 (4th Cir. 2016)). There must be a “realistic probability, not a theoretical possibility,” that a state would actually punish that minimum conduct. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

III.

At the time of Dinkins’s conviction in 2004, ABIK was a common-law crime in South Carolina. Although the South Carolina legislature abolished common-law ABIK in 2010, this case requires us to examine the nature of the common-law crime prior to its repeal. *See* S.C. Code Ann. § 16-3-620 (1976), *repealed by* Act No. 273 § 7.A, at 13 (2010).

² A court can apply a modified categorical approach if the prior state offense is divisible, “meaning it sets out multiple elements in the alternative and at least one set of elements matches the federal definition” of a violent felony. *Doctor*, 842 F.3d at 308 n.3. The predicate state crime in this case, South Carolina ABIK, is not divisible.

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South Carolina courts have defined ABIK as “an unlawful act of violent nature to the person of another with malice aforethought, either express or implied.” *Suber v. State*, 640 S.E.2d 884, 886 (S.C. 2007); *State v. Sutton*, 532 S.E.2d 283, 285 (S.C. 2000). The State’s case law establishes that ABIK has three elements: (1) assault, (2) battery, and (3) the *mens rea* requirement. Assault and battery include “any touching of the person of an individual in a rude or angry manner, without justification.” *State v. Mims*, 335 S.E.2d 237, 237 (S.C. 1985) (citation and internal quotation marks omitted). Thus, neither assault nor battery involve the type of violent, physical injury required by the ACCA force clause. *See Johnson I*, 559 U.S. at 140. For this reason, in *United States v. Hemingway*, 734 F.3d 323, 335 (4th Cir. 2013), we held that the South Carolina offense of assault and battery with a high and aggravated nature was not categorically an ACCA violent felony.

The additional *mens rea* element in ABIK requires a different result here. South Carolina courts have often explained that “if the [ABIK] victim had died from the injury, the defendant would have been guilty of murder.” *Sutton*, 532 S.E.2d at 285; *accord Suber*, 640 S.E.2d at 886; *State v. Fennell*, 531 S.E.2d 512, 517 (S.C. 2000); *State v. Foust*, 479 S.E.2d 50, 51 (S.C. 1995). Both murder and ABIK require only a general intent to kill. *See State v. Mattison*, 697 S.E.2d 578, 586 n.3 (S.C. 2010); *Sutton*, 532 S.E.2d at 285; *Foust*, 479 S.E.2d at 51. “The required mental state for ABIK, like murder, is malice aforethought.” *Fennell*, 531 S.E.2d at 517; *accord Blakely v. State*, 602 S.E.2d 758, 759 (S.C. 2004); *Foust*, 479 S.E.2d at 51. The *mens rea* requirement in ABIK is thus satisfied

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“so long as there is intent to commit grievous bodily injury such that, had death occurred, the offense would have been murder.” *Foust*, 479 S.E.2d at 51–52.³

Dinkins contends that ABIK is not a violent felony because the “intent in someone’s mind does not equate to the use, attempted use or threatened use of violent physical force.” Appellee Br. 17–18.⁴ To be sure, a person’s intent to injure another grievously does not necessarily mean that the person has “used” violent physical force. But this principle does not compel the conclusion that ABIK is not categorically violent. This is so because to convict a defendant of ABIK, a State prosecutor had 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 ABIK victim to die. *See Foust*, 479 S.E.2d at 51–52; *Intent*, *Black’s Law Dictionary* (10th ed. 2014) (defining general intent as the “intent to perform an act even though the actor does not desire the consequences that

³ The Supreme Court of South Carolina recently reiterated these requirements in *State v. King*, ___ S.E.2d ___, No. 2015-001278, 2017 WL 4800004 (S.C. Oct. 25, 2017). The court reviewed the history of ABIK and held that in contrast to ABIK, which requires only a general intent to kill, the codified crime of attempted murder requires a specific intent to kill. *Id.* at *5–8; *see* S.C. Code Ann. § 16-3-29 (2003). Although some of the other language in *King* is unclear, this holding accords with the holding we reach today, and with the way that South Carolina courts have consistently viewed ABIK.

⁴ Dinkins also briefly attempts to rely on *State v. Glover*, 4 S.E. 564, 567 (S.C. 1888), which upheld a defendant’s conviction, even though the defendant had not succeeded in killing a child by poisoning, because the defendant clearly intended to kill the child and “some physical force must have been exerted to compel so small a child to drink such a nauseous drug.” It is not clear that *Glover* involved an ABIK conviction. *See Dinkins v. United States*, 213 F. Supp. 3d 784, 787 nn.2 & 4 (D.S.C. 2016). But even if it did, *Glover* does not assist Dinkins here because the Supreme Court has expressly held that poisoning another “to cause physical harm” constitutes “violent force,” even though “the harm occurs indirectly, rather than directly.” *United States v. Castleman*, 134 S. Ct. 1405, 1414–15 (2014).

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result”). Surely, a person who satisfies this requirement has “attempted . . . or threatened [to] use” “force capable of causing physical pain or injury.” *See Johnson I*, 559 U.S. at 140, 143.

Even where the actual injury in an ABIK case was 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. Moreover, in practice, South Carolina has permitted courts and juries to infer the defendant’s intent by looking to the actual use — rather than the attempted use — of violent force. *See Foust*, 479 S.E.2d at 49, 52 n.4; *State v. Dennis*, 742 S.E.2d 21, 27–28 (S.C. Ct. App. 2013); *State v. Coleman*, 536 S.E.2d 387, 388–90 (S.C. Ct. App. 2000).

We therefore conclude that ABIK categorically constituted a violent felony under the ACCA force clause. We note that the First and Sixth Circuits have reached this very conclusion with respect to similar *mens rea* elements that require specific intent. *See United States v. Edwards*, 857 F.3d 420, 425 (1st Cir. 2017) (Massachusetts armed assault with intent to murder); *Raybon v. United States*, 867 F.3d 625, 631–32 (6th Cir. 2017) (Michigan assault with intent to do great bodily harm). As the *Edwards* court said, “an assault committed with an intent to murder the victim becomes an attempted or threatened harmful battery — and thus an ACCA violent felony — because of the presence of that intent.” 857 F.3d at 425.

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IV.

For the foregoing reasons, the judgment of the district court is

REVERSED.

213 F.Supp.3d 784
United States District Court,
D. South Carolina, Columbia Division.

Deon DINKINS, Defendant-Petitioner

v.

UNITED STATES of America, Plaintiff-Respondent.

Cr. No. 3:11-2061-CMC

Signed October 3, 2016

Synopsis

Background: Following affirmance of his conviction for being a felon in possession of a firearm, 486 Fed.Appx. 355, defendant filed motion to vacate.

[Holding:] The District Court, Cameron McGowan Currie, Senior District Judge, held that defendant's prior conviction under South Carolina law for common law offense of assault and battery with intent to kill was not predicate violent felony under force clause of Armed Career Criminal Act (ACCA).

Motion granted.

West Headnotes (3)

[1] Sentencing and Punishment

⚡ Particular offenses

Defendant's prior conviction under South Carolina law for common law offense of assault and battery with intent to kill did not have as an element the use, attempted use, or threatened use of violent physical force against the person of another, and thus, was not a predicate "violent felony" under the force clause of the Armed Career Criminal Act (ACCA), since any forcible contact, irrespective of its degree, sufficed to support the South Carolina conviction. 18 U.S.C.A. § 924(e)(2)(B)(i).

1 Cases that cite this headnote

[2] Sentencing and Punishment

⚡ Violent or Nonviolent Character of Offense

The phrase "physical force," in Armed Career Criminal Act's (ACCA) definition of a violent felony as an offense that has as an element the use, attempted use, or threatened use of physical force against the person of another, means violent force, that is, force capable of causing physical pain or injury to another person. 18 U.S.C.A. § 924(e)(2)(B)(i).

Cases that cite this headnote

[3] Federal Courts

⚡ Criminal Justice

In evaluating a state court conviction for Armed Career Criminal Act (ACCA) predicate offense purposes, a federal court is bound by the state supreme court's interpretation of state law, including its determination of the elements of the potential predicate offense. 18 U.S.C.A. § 924(e)(1).

1 Cases that cite this headnote

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Recognized as Unconstitutional

18 U.S.C.A. § 924(e)(2)(B)(ii)

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Opinion

Opinion and Order

CAMERON MCGOWAN CURRIE, Senior United States District Judge

Defendant, through his attorney, seeks relief pursuant to 28 U.S.C. § 2255. ECF No. 116. The Government filed a

response in opposition on June 26, 2016. ECF No. 120. On July 5, 2016, Defendant filed a response in support. ECF No. 121.

I. Background

On August 17, 2011, Defendant was indicted for felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1), 924(a)(2), and 924(e). ECF No. 2. On February *785 17, 2012, Defendant entered into a written conditional plea agreement to plead guilty to the charge. ECF No. 50. The same day, Defendant appeared before the court and after a thorough Rule 11 hearing, entered a guilty plea to felon in possession.

A Pre-Sentence Report (PSR) concluded Defendant was an armed career criminal under the Armed Career Criminal Act ("ACCA") and faced a mandatory minimum term of imprisonment of fifteen (15) years and a maximum term of life imprisonment. The PSR found that Defendant's prior convictions for Possession with Intent to Distribute Cocaine (1992), distribution of crack cocaine/distribution of crack cocaine near a school (1994), and assault and battery with intent to kill ("ABWIK"), qualified as predicate convictions for ACCA purposes. See ECF No. 60, PSR ¶¶ 24, 26, 27. No objections were made to the PSR regarding Defendant's ACCA predicate convictions.

On April 25, 2012, Defendant appeared for sentencing. The court varied from the guideline range of 188-235 months based on Defendant's "history of mental illness and treatment and his strong family support." ECF No. 64. Defendant was sentenced to 180 months' imprisonment and five years' supervised release. Defendant appealed the denial of a motion to suppress and the Fourth Circuit affirmed the judgment on October 22, 2012. ECF No. 78.

Defendant filed a § 2255 motion on January 10, 2013, arguing that his counsel was ineffective for several reasons, including because he failed to "thoroughly investigate and challenge" Defendant's prior convictions that were used as predicate offenses, and asserting that he was not an armed career criminal. ECF No. 80. Specifically, Defendant argued that his conviction for possession of "a small amount of drugs" was not sufficient to qualify as an ACCA predicate. ECF No. 80-1, at 39. The Government agreed that Defendant's conviction in Paragraph 25 of the PSR, possession of cocaine

(1993), did not count as a predicate drug offense for the ACCA. However, the Government asserted, and the court adopted as its finding, that Defendant had other offenses that qualified him as an armed career criminal. ECF No. 93 (Government's Response in Opposition); ECF No. 99 (Order granting Government's Motion for Summary Judgment) ("[F]or the reasons argued by the Government in its response in opposition, which the court adopts as its findings, Defendant is not entitled to relief."). Therefore, the court dismissed Defendant's § 2255 motion with prejudice. ECF No. 99.

Defendant filed a second *pro se* motion under § 2255 on May 16, 2014, arguing again that he was improperly enhanced under the ACCA because his conviction for possession of cocaine in 1993 was not for a serious drug offense. ECF No. 102. The court dismissed this motion as successive on May 19, 2014. ECF No. 212.

Prior to filing the instant motion, Defendant filed a § 2244 motion with the Fourth Circuit. No. 16-853. On June 2, 2016, he received permission to file a second or successive motion under § 2255. ECF No. 115. The instant motion under § 2255 was filed the same day. ECF No. 116.

II. The ACCA

A conviction for felon in possession typically carries a statutory maximum sentence of ten years in prison. See 18 U.S.C. § 924(a)(2). However, if the accused has three or more previous convictions for certain types of felonies, he is subject to an enhanced minimum sentence of fifteen years imprisonment with a maximum term of life imprisonment. Title 18 U.S.C. § 924(e)(1) provides:

*786 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....

As is relevant to this case, the statute defines "violent felony" as

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....

18 U.S.C. § 924(e)(2)(B). The first clause, § 924(e)(2)(B)(i), is typically referred to as the “use of force” clause (“has as an element the use, attempted use, or threatened use of physical force against the person of another.”). The first part of the second clause, § 924(e)(2)(B)(ii), lists specific offenses—burglary, arson, extortion, offenses involving use of explosives—and is commonly denoted the “enumerated offense” clause. Finally, the portion of § 924(e)(2)(B)(ii) covering a conviction that “otherwise involves conduct that presents a serious potential risk of physical injury to another” is generally referred to as the “residual clause.”

III. *Johnson and Welch*

On June 26, 2015, the Supreme Court held that the residual clause of the ACCA violates due process as it “denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson v. United States*, 576 U.S. —, —, 135 S.Ct. 2551, 2557, 192 L.Ed.2d 569 (2015). By holding the residual clause unconstitutionally vague, the Court narrowed the predicate offenses that could serve to enhance a sentence to those that qualify under the enumerated or force clauses. The residual clause can no longer support a defendant's classification as an armed career criminal.

On April 18, 2016, the Supreme Court decided *Welch v. United States*, 578 U.S. —, 136 S.Ct. 1257, 194 L.Ed.2d 387 (2016), which held that the newly established right recognized in *Johnson* is retroactive to cases on collateral review, such as Defendant's case. Therefore, Defendant's §

2255 motion, filed within one year of the *Johnson* decision, is timely¹ and ripe for resolution.

a. ACCA Discussion

At the time of his sentencing, Defendant had three predicate South Carolina convictions which served to qualify him for the ACCA enhancement: Possession with Intent *787 to Distribute Cocaine (1992), distribution of crack cocaine/distribution of crack cocaine near a school (1994), and assault and battery with intent to kill (“ABWIK”). See ECF No. 60, PSR ¶¶ 24, 26, 27.

[1] Defendant's two serious drug offenses are unaffected by *Johnson* and its progeny. Therefore, the issue at hand is whether the ABWIK conviction qualifies as an ACCA predicate conviction under the force clause, or only qualified under the now-defunct residual clause, in which case Defendant is no longer an armed career criminal.

ABWIK was a South Carolina common law offense before it was abolished in 2010. As Defendant was sentenced in 2004, South Carolina common law applies.² ABWIK is defined as an “unlawful act of a violent nature to the person of another with malice aforethought, either express or implied.” *State v. Foust*, 325 S.C. 12, 479 S.E.2d 50, 51 (1996). ABWIK also requires an intent to kill; however, this intent need not be a specific intent to kill, but may be a general intent “so long as there is intent to commit grievous bodily injury such that, had death occurred, the offense would have been murder.” *Id.* at 51–52.

[2] In order to decide whether Defendant's conviction qualifies under the ACCA force clause, this court must use the categorical approach³ to determine whether ABWIK “has as an element the use, attempted use, or threatened use of physical force against the person of another.” § 924(e)(2)(B)(i). An attempted or threatened use of force would constitute assault with intent to kill, but actual use of force is required for ABWIK, due to the requirement of a battery.⁴ As defined by the *788 Supreme Court, “the phrase ‘physical force’ means violent force—that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (“*Johnson 2010*”). Therefore, in order to qualify under the ACCA force

clause, ABWIK must require the use of violent physical force—"unwanted touching" or slight intentional physical contact is not sufficient. *See id.* at 139, 130 S.Ct. 1265.

[3] "In evaluating a state court conviction for ACCA predicate offense purposes, a federal court is bound by the [state supreme court's] interpretation of state law, including its determination of the elements of the potential predicate offense." *Hemingway*, 734 F.3d at 332. As precedent from South Carolina courts makes clear, assault and battery in South Carolina does not require the "violent physical force" necessary to satisfy the *Johnson 2010* definition of force for the ACCA, as "any forcible contact, irrespective of its degree, will suffice." *Mellen v. Lane*, 377 S.C. 261, 659 S.E.2d 236, 244 (2008); *see also State v. LaCoste*, 347 S.C. 153, 553 S.E.2d 464, 471 (S.C. Ct. App. 2001) (battery can be committed with "any touching of the person in a rude or angry manner, without justification."). 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." *State v. Primus*, 349 S.C. 576, 564 S.E.2d 103, 106 n.4 (2002) (overruled on other grounds regarding sufficiency of indictment); *State v. Green*, 327 S.C. 581, 491 S.E.2d 263 (S.C. Ct. App. 1997).

The South Carolina Criminal Requests to Charge define battery as "the unlawful touching or striking of another by the aggressor himself or by any substance put in motion by him.... an injury done to the person of another in a rude, insolent, or revengeful way." Ralph King Anderson, Jr., *South Carolina Requests to Charge-Criminal*, 2007, § 2-18.⁵ The battery necessary for an ABWIK conviction carries no greater requirement of force than battery in ABHAN or even simple assault and battery. *See id.* at §§ 2-19, 2-20 (defining both "assault" and "battery" in exactly the same terms for ABWIK, ABHAN, and simple assault and battery).

Defendant cites *Hemingway* in support of his position, which dealt with South Carolina ABHAN. 734 F.3d 323. In that case, the Government "properly concede[d]" that *Johnson 2010* "precludes reliance on the force clause to count ABHAN as an ACCA predicate offense because ABHAN can be committed even if no real force was used against the victim." *Id.* at 335; *see also United States v. Montez-Flores*, 736 F.3d 357, 369 (4th Cir. 2013) (addressing the identically worded force clause of the

illegal re-entry guideline on direct appeal, and holding, as to South Carolina ABHAN, "[b]ecause ABHAN can be committed with or without force—and even when force is involved, ABHAN can be committed in a violent or nonviolent manner—a conviction for ABHAN is not categorically for a crime of violence.").

ABHAN is often considered a lesser included offense of ABWIK. *See State v. Dennis*, 402 S.C. 627, 742 S.E.2d 21, 27 (S.C. Ct. App. 2013). Defendant argues that the difference between the two is only the *mens rea* of malice, while the Government *789 contends that both malice and intent to kill distinguish ABWIK from ABHAN. *See* ECF Nos. 116 (Defendant's motion) and 120 (Government's response in opposition). South Carolina law demonstrates that ABWIK requires "both an intent to kill and malice." *Foust*, 479 S.E.2d at 51. However, South Carolina jury instructions show that the operative element of action, assault and battery, is the same in ABWIK as in ABHAN. Despite the additional requirement of intent to commit serious bodily injury and heightened *mens rea* in ABWIK, no additional level of force distinguishes ABWIK from ABHAN. South Carolina law makes clear that "use, attempted use or threatened use" of violent physical force is not an element of ABHAN, as the Government conceded in *Hemingway*; therefore, the use of violent physical force cannot be an element of ABWIK.

South Carolina case law makes clear that an assault and battery may be committed without the application of violent physical force. The Fourth Circuit consistently holds, under *Johnson 2010*, that this is insufficient force to qualify as a "violent felony" or "crime of violence" under a force clause. Therefore, this court cannot say that ABWIK has as an element the use, attempted use, or threatened use of physical force against the person of another. As such, it cannot be classified as a predicate offense under the force clause of the ACCA. Accordingly, ABWIK could only have counted as an ACCA predicate under the now-unconstitutional residual clause. As a result, it can no longer serve as a predicate offense for the ACCA.

IV. Conclusion

As Defendant no longer has the requisite three predicate convictions, he is not an armed career criminal and is entitled to be resentenced. The court grants Defendant's motion for relief under § 2255. The Judgment Order as to Deon Dinkins in CR 3:11-2061 filed April 25, 2012 is

hereby vacated, and this matter is set for resentencing on
Tuesday, November 1, 2016 at 3:30pm.

All Citations

IT IS SO ORDERED.

213 F.Supp.3d 784

Footnotes

- 1 "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
 (1) the date on which the judgment of conviction becomes final;
 (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
 (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review...."
 28 U.S.C. § 2255(f)(1)–(3). Due to *Welch*, § 2255(f)(3) is applicable to *Johnson* cases on collateral review, and defendants had until June 26, 2016 to file. Defendant filed his motion on June 2, 2016.
- 2 South Carolina also recognizes assault with intent to kill as a separate offense from ABWIK. *State v. Sutton*, 340 S.C. 393, 532 S.E.2d 283, 286 (2000) ("Under our current common law, we recognize ABIK and assault with intent to kill (AIK)."). For AIK, it is not necessary that the attempted harm or injury actually take place. *See id.* (using "pointing a toy gun at someone or withholding life-saving medication" as examples of assault with intent to kill); *State v. Glover*, 27 S.C. 602, 4 S.E. 564 (1888) (affirming conviction for assault with intent to kill based on attempted poisoning).
- 3 This court does not employ the modified categorical approach as the offense is not divisible. *Mathis v. United States*, 579 U.S. —, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) ("The comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime."). Common law offenses are treated the same as statutory offenses for divisibility purposes. *United States v. Hemingway*, 734 F.3d 323, 331–32 (4th Cir. 2013) (addressing South Carolina common law offense of assault and battery of a high and aggravated nature ("ABHAN") and noting "[t]here is simply no material distinction that can be made between common law and statutory offenses [in the context of divisibility]... [T]he modified categorical approach has no role to play where the previous crime was an indivisible common law offense."). *Hemingway* also noted that common law ABHAN is an indivisible offense. *Id.* at 334 ("Because ABHAN, as defined by the courts of South Carolina, does not concern any list of alternative elements, the modified categorical approach has no role to play." (citations omitted)). ABWIK contains the same elements as ABHAN plus malice and intent to commit grievous bodily injury; therefore, ABWIK, which has no alternative elements, is an indivisible common law offense as well.
- 4 *See Glover*, 4 S.E. at 566 (holding that an attempt to poison (administering a drug which defendant has been informed will produce death, whether such drug in fact is poisonous or not), constitutes assault with intent to kill); *Sutton*, 532 S.E.2d at 286 (defining assault as placing another in apprehension of harm and noting "[t]hus, if a person shook his hickory over his head, indicating an intention to strike, and within striking distance, and if his action and conduct were such as to create the belief in the mind of the victim that he intended to strike him, he would be guilty of an assault.").
- 5 The 2012 version of Anderson's Requests to Charge is available on Westlaw; however, that edition does not contain the common law offense of ABWIK, as ABWIK was abolished in 2010. The 2007 version of Anderson's Requests to Charge is available from the Fourth Circuit library in Raleigh, North Carolina.

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FILED: December 12, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4795
(3:11-cr-02061-CMC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellant

v.

DEON DINKINS

Defendant - Appellee

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is reversed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK