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## NOTE

# **RIGHT, BUT FOR THE WRONG REASONS: HOW A CERTIFIED QUESTION TO THE SUPREME COURT OF NORTH CAROLINA COULD HAVE ALLEVIATED CONFLICTING VIEWS AND BROUGHT CLARITY TO NORTH CAROLINA STATE LAW**

SHARIKA ROBINSON\*

### I. INTRODUCTION

Unconstitutional or dogmatic, North Carolina is the only state that has never enacted a procedure by which a federal court could certify a question of state law to its state Supreme Court.<sup>1</sup> As a result, federal courts, facing unanswered issues of North Carolina law that are attempting to abide by the *Erie* doctrine are forced to take a guess as to how the Supreme Court of North Carolina would decide such unresolved issues of state law.<sup>2</sup> There are but two scenarios which could result from the current federal court guesswork of how the Supreme Court of North Carolina would interpret North Carolina state law. One, the federal court could interpret the statute correctly; that is, decide it in the same manner as the Supreme Court of North Carolina would if so required. This is the result one hopes for. Two, the federal court could interpret the statute incorrectly, which would result in an impasse of federal and state law. This is the result one should prepare for. As the old idiom goes, “Hope for the best and prepare for the worst.”<sup>3</sup> Either way, the result is inevitable: principles of federalism

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1. Eric Eisenberg, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 69 (2008).

2. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 61, 61-62 (1995).

3. THE CONCISE OXFORD DICTIONARY OF PROVERBS 114, (J.A. Simpson ed., Oxford University Press, 1982).

are evaded and North Carolina law becomes the subject of a federal court's interpretation.<sup>4</sup> Preparation in this instance could be achieved by developing a certification process.<sup>5</sup> On the other hand, if the current process is not refined, it could result in a Pandora's Box where a state court reverses the holding of a federal court.<sup>6</sup>

Viewed in the composite, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and the Rules of Decision Act establish that federal courts do not have the authority to displace state law.<sup>7</sup> Pursuant to § 34 of the Judiciary Act of 1789, the Rules of Decision Act provided that, "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."<sup>8</sup> Over half a century later, Justice Joseph Story declared in *Swift v. Tyson*, 41 U.S. 1 (1842), that the textual meaning of "laws" written in the Judiciary Act of 1789 only applied to state statutes, that state courts' opinions were not binding on federal courts, and that federal courts could create federal common law.<sup>9</sup> In the landmark decision of *Erie*, the Supreme Court of the United States overruled the holding in *Swift*, noting that the decision encouraged forum shopping, decreased uniformity of state law, and denied citizens equal protection under the laws of the state.<sup>10</sup> The Court in *Erie* noted:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature

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4. 12 U.L.A. 61, 61-62 (noting the federal courts have been forced to guess what the state court might rule if the precise issue of law were presented to it). See also Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. Rev. 2123, 2135 (1999) ("And when federal courts decide unsettled questions of state law in cases involving policy judgments with widespread impact, the intrusion on state sovereignty is at its greatest.").

5. 12 U.L.A. 61, 61-62 (noting that a certification process could potentially alleviate variance in how the federal courts interpret and apply state law and potentially prevent federal courts from intruding into state matters).

6. John R. Brown, *Certification - Federalism in Action*, 7 CUMBERLAND L. REV. 455, 455 (1977) (noting that the state may reverse federal court holdings that make a "guess" at construing state law). See also *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500 (1941) ("In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court." (citations omitted)).

7. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 312-13 (1981). See also *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 37-38 (1988) (Scalia, J., dissenting).

8. Judiciary Act of 1789, 28 U.S.C. § 1652 (2006) (corresponds to the Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92).

9. *Swift v. Tyson*, 41 U.S. 1, 18-19 (1842), overruled by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

10. *Erie*, 304 U.S. at 89-90.

in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.<sup>11</sup>

While *Erie* directed federal courts to consider state law when adjudicating a state matter, *Erie* provided no guidance on how to proceed when the highest court in the state has not decided the issue before the federal court.<sup>12</sup> In *West v. American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), the Supreme Court of the United States offered guidance, holding that:

Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.<sup>13</sup>

Thus, distinguishable from the decisions of a state's highest court, federal courts are not strictly bound by decisions of a state's appellate courts.<sup>14</sup>

In *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941), the Supreme Court of the United States introduced the doctrine of abstention, allowing federal courts the discretion to abstain from answering state law questions.<sup>15</sup> When a federal court abstains, it stays litigation in federal court.<sup>16</sup> Litigants obtain answers from state court via a declaratory judgment.<sup>17</sup> After the declaratory judgment is obtained from the state court, the federal court resumes litigation.<sup>18</sup> As one could imagine, this is a long and arduous process.<sup>19</sup> In an attempt to expedite the process, federal courts began to explore certification.<sup>20</sup>

Certification is the process by which a federal court, confronted with a question of unsettled state law, may submit questions to the state's supreme court rather than guess at how the state's supreme

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11. *Id.* at 78.

12. *See id.*

13. *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940).

14. *See id.*

15. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 501 (1941) (noting it is appropriate for United States federal courts to abstain from hearing a case to allow state courts to decide substantial issues of state law).

16. 32A AM. JUR. 2D *Federal Courts* § 1054 (2007).

17. *Id.* at § 1065.

18. *Id.* at § 1067.

19. *Id.* at § 1064.

20. UNIF. CERTIFICATION OF QUESTIONS OF LAW ACT, Prefatory Note, 12 U.L.A. 61, 62 (1995) ("[Certification] is a more rapid method than the use of the abstention doctrine and seems to be a much more orderly way of handling the problem.").

court would decide the issue.<sup>21</sup> This process was first endorsed by the Supreme Court of the United States in *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207 (1960).<sup>22</sup> In *Clay*, the Supreme Court vacated and remanded a Fifth Circuit decision, noting there were unresolved issues of Florida state law present and urged the court to utilize Florida's certification process to address those issues.<sup>23</sup> Since *Clay*, the usage of the certification process has grown.<sup>24</sup> The Supreme Court has noted that the certification procedure is an example of cooperative federalism and preserves judicial economy.<sup>25</sup> The compelling results of certification processes throughout the country may explain why North Carolina remains companionless in its effort to abstain from enacting its own certification procedures.

Rather than explaining reasons that may clarify North Carolina's decision to abstain from enacting a certification procedure,<sup>26</sup> this Note addresses the effect of North Carolina's lack of a certification process by examining *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011), where the Fourth Circuit, sitting en banc, split regarding its interpretation of North Carolina's Indecent Liberties with Children Statute ("Indecent Liberties Statute")<sup>27</sup> resulting in "a mess of opinions."<sup>28</sup> First, this Note presents the facts of *Vann*. The Note then explores the legal history of the Indecent Liberties Statute and the legal background regarding its application. The Note then transitions into the holding of *Vann*. The Note concludes that the majority opinion entered the correct judgment; however, due to the ambiguities of North Carolina's case law,<sup>29</sup> it is possible that judgment was based upon an incorrect analysis of North Carolina law. Thus, a certification process in North Carolina is critical to resolving analogous issues in the future. Further, this Note opines that, because the interpretation of North Carolina's Indecent Liberties Statute by federal courts is inconsistent in different federal circuits and districts, individuals with convictions under North Carolina law are not afforded equal protection under the laws.

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21. *Id.* at 61-62.

22. *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960).

23. *Id.*

24. J. Michael Medina, *The Interjurisdictional Certification of Question of Law Experience: Federal, State, and Oklahoma- Should Arkansas Follow?*, 45 ARK. L. REV. 99, 104-06 (1992).

25. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (stating that certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism"). See also *Bellotti v. Baird*, 428 U.S. 132, 150 (1976).

26. See generally Eisenberg, *supra* note 1. See also Smith, *supra* note 4, at 2125.

27. *United States v. Vann*, 660 F.3d 771, 772 (4th Cir. 2011) (en banc) (plurality opinion).

28. Posting of Robyn Hagan Cain to FindLaw, [http://blogs.findlaw.com/fourth\\_circuit/2011/10/fourth-cir-overturns-armed-career-criminal-sentence-enhancement.html](http://blogs.findlaw.com/fourth_circuit/2011/10/fourth-cir-overturns-armed-career-criminal-sentence-enhancement.html) (Oct. 12, 2011, 15:04 EST) (noting the decision included seven separate opinions and totaled one hundred pages).

29. *Vann*, 660 F.3d at 790.

## II. THE FACTS

Torrell Vann (“Vann”) was arrested in possession of a handgun on January 20, 2008, in violation of 18 U.S.C. § 922(g)(1) and § 924.<sup>30</sup> In November of 2008, a grand jury indicted Vann with one count of possession of a handgun by a violent felon pursuant to § 922(g)(1) and § 924 and alleged that Vann was subject to enhanced sentencing pursuant to § 924(e)(1).<sup>31</sup> Pursuant to § 924(e)(1), if the accused has three or more violent felony convictions, as defined under the Armed Career Criminal Act (“ACCA”), the accused is subject to an enhanced sentencing of a minimum of fifteen years with a maximum of life imprisonment.<sup>32</sup> The ACCA defines a “violent felony” as:

... any crime punishable by imprisonment for a term exceeding one year . . . 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 . . .<sup>33</sup>

Without the ACCA enhanced sentencing, Vann was subject to a maximum of ten years in prison.<sup>34</sup> On December 15, 2008, Vann pleaded guilty as charged.<sup>35</sup> Vann’s presentence report (“PSR”) indicated that he had three prior convictions for violating the Indecent Liberties Statute under chapter 14, section 202.1 of the North Carolina General Statutes.<sup>36</sup> The Statute provides in pertinent part:

A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either: (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.<sup>37</sup>

Taking into account the ACCA enhanced sentencing, the probation officer calculated Vann’s sentence as carrying a statutory minimum of 180 months.<sup>38</sup> Vann objected to the enhanced sentencing, citing *Begay v. United States*, 553 U.S. 137 (2008), and *United States v.*

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30. *Id.* at 772.

31. *Id.*

32. See 28 U.S.C. § 924(e)(1) (2006).

33. *Id.* § 924(e)(2)(B).

34. See *id.* § 922(g).

35. *Vann*, 660 F.3d at 772.

36. *Id.*

37. N.C. Gen. Stat. § 14-202.1 (2011).

38. *Vann*, 660 F.3d at 809.

*Thornton*, 554 F.3d 443 (4th Cir. 2009), as support.<sup>39</sup> The government refuted Vann's argument, noting the PSR calculation was correct and citing *United States v. Pierce*, 278 F.3d 282 (4th Cir. 2002), as support for its proposition.<sup>40</sup> The district court found the government's argument persuasive finding that Vann's prior convictions were ACCA violent felonies.<sup>41</sup> On March 17, 2009, Vann was sentenced to the statutory minimum of fifteen years in prison.<sup>42</sup>

Vann filed a timely appeal<sup>43</sup> alleging that pursuant to *Begay*, not "every crime that presents a serious potential risk of physical injury to another" is a violent felony for ACCA purposes; rather, only those crimes "that are roughly similar, in kind as well as in degree of risk posed, to" burglary, arson, extortion, and crimes involving the use of explosives.<sup>44</sup> Therefore, according to Vann, the Fourth Circuit's holding in *Pierce* is implicitly overruled by *Begay*; and thus, his previous convictions are not sufficient to invoke enhanced sentencing under the ACCA.<sup>45</sup> Vann contended further that pursuant to North Carolina case law, an accused need not touch or be in the presence of a victim to be convicted pursuant to Indecent Liberties Statute.<sup>46</sup> Hence, Vann argued that the indecent liberties offense cannot satisfy the requirements of an ACCA violent felony.<sup>47</sup> To illustrate this perspective, Vann argued the Court should follow *United States v. Thornton*, 554 F.3d 443 (4th Cir., 2009), a post-*Begay*, Fourth Circuit decision where the court, guided by Virginia law, concluded that Virginia's statutory rape offense is not an ACCA violent felony because it does not require force.<sup>48</sup>

On appeal, the government argued that Vann's prior convictions for indecent liberties were ACCA violent felonies because established Fourth Circuit case law indicated that a violation of the Indecent Liberties Statute is a crime of violence in the context of the Sentencing

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39. *Id.* at 773. See generally *Begay v. United States*, 553 U.S. 137 (2008) (holding that a driving under the influence offense is not a violent felony within the meaning of the ACCA); *United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) (holding that a Virginia statutory rape offense is not a violent felony within the meaning of the ACCA).

40. *Vann*, 660 F.3d at 773. See generally, *United States v. Pierce*, 278 F.3d 282, 290 (4th Cir. 2002) (holding a conviction under the Indecent Liberties Statute is a crime of violence for purposes under the career offender enhancement sentencing guidelines).

41. *Vann*, 660 F.3d at 773.

42. *Id.*

43. *Id.*

44. *Id.* at 779 (citing *Begay*, 553 U.S. at 142-43).

45. *United States v. Vann*, 620 F.3d 431, 434 (4th Cir. 2010) (en banc).

46. *Id.*

47. *Id.*

48. *Id.*

Guidelines' career-offender enhancement.<sup>49</sup> Thus, the government relied on the argument that an ACCA violent felony is interchangeable with a "crime of violence" for career-offender enhancement.<sup>50</sup> Additionally, the government argued that the offense qualifies as a violent felony pursuant to ACCA because, as *Pierce* held, it "involves conduct that presents a serious potential risk of physical injury to another."<sup>51</sup> Thus, the government maintained that if an offense presents a serious potential risk to another, it satisfies the "residual" provision of the ACCA.<sup>52</sup>

In the majority opinion written by Judge Niemeyer, in which Judge Shedd joined, the Court concluded that North Carolina's Indecent Liberties Statute criminalized two different types of behavior noting, "One requires physical acts against the body of a child, and the other does not."<sup>53</sup> Thus, the Court applied the modified categorical approach to determine which crime was the basis for Vann's conviction and whether Vann's offense was a qualifying violent felony.<sup>54</sup> The Court consulted Vann's PSR that echoed the language of the Indecent Liberties Statute, and also, upon request by the Court, it reviewed Vann's charging documents.<sup>55</sup> After applying the modified categorical approach, the Court concluded that because Vann pleaded guilty to the offense, it need not be determined which prong of the offense Vann committed.<sup>56</sup> Accordingly, the majority held that Vann's prior offenses satisfied the ACCA definition of violent felony because taking indecent liberties with a child by "willfully committing a lewd or

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49. *Id.* at 433-34 (quoting *United States v. Pierce*, 278 F.3d 282, 286 (4th Cir. 2002)) (quoting further that "by its nature, [taking indecent liberties] present[s] a serious potential risk of physical injury to another").

50. *See id.* at 433.

51. *Id.* at 433-34 (quoting 18 U.S.C. § 924(e)(2)(B) (2006)).

52. *Id.* (using the term the "residual provision" to refer to the portion of the violent felony definition in 18 U.S.C. § 924(e)(2)(B)(ii) (2006) that includes any crime which "otherwise involves conduct that presents a serious potential risk of physical injury to another"). *See also* *United States v. Vann*, 660 F.3d 771, 779 n.2 (4th Cir. 2011) (describing the government's early argument that, because of the victim's age under the Indecent Liberties Statute, the offense implies constructive force that qualifies it as a violent felony pursuant to 18 U.S.C. § 924(e)(2)(B)(i) (2006), and the government's subsequent abandonment of this argument in light of the Supreme Court's holding in *Johnson v. United States*, 130 S. Ct. 1265, 1270 (2010), that an offense involving "intellectual force or emotional force" without violent physical force is insufficient to qualify as a violent felony under the statute).

53. *Vann*, 620 F.3d at 436. *See generally* *Shepard v. United States*, 544 U.S. 13, 15 (2005) (indicating that the modified categorical approach may be only be applied in narrow circumstances where a statute is broad, such that it prohibits many different type of behavior).

54. *Vann*, 620 F.3d at 435-36. *See also* *Shepard*, 544 U.S. at 17 (2005) (noting that where the modified categorical approach is applied, a court is not limited to the examining the elements of the statute, it can review the particular facts disclosed by the record of conviction, such as, the indictment to determine whether the offense meets the definition of a violent felony under the ACCA).

55. *Vann*, 620 F.3d at 437-38.

56. *Id.* at 438 n.2.



lascivious act upon or with the body of the child” resulted in “a potential risk of physical injury to the child that is at least as serious as the risk facing a victim of arson or burglary.”<sup>57</sup> As such, the Court affirmed Vann’s sentence.<sup>58</sup>

In Judge King’s dissenting opinion, he noted that North Carolina’s Indecent Liberties Statute does not contain two criminal offenses; but rather, it criminalizes a single crime.<sup>59</sup> Judge King further noted that it cannot be determined whether Vann violated the second prong of the Statute from the PSR or the charging documents.<sup>60</sup> Lastly, Judge King noted that the second prong of the Statute is not a violent crime for purposes of the ACCA.<sup>61</sup>

Vann filed a timely petition for rehearing en banc.<sup>62</sup> The Court granted Vann’s petition for rehearing en banc and vacated the panel opinion.<sup>63</sup> In the majority, per curiam opinion, the Court concluded that North Carolina’s Indecent Liberties Statute criminalizes two types of offenses.<sup>64</sup> Thus, the Court invoked the modified categorical approach.<sup>65</sup> After analyzing the documents, the Court held that it could not determine whether Vann pleaded guilty to subsection (a)(1) or subsection (a)(2) of the offense.<sup>66</sup> Accordingly, the Court vacated Vann’s sentence and remanded the case for further proceedings.<sup>67</sup> Judge King wrote a concurring opinion in which he concurred with the judgment reached by the Court, but expressed the view that the categorical approach, rather than the modified categorical approach, should have been applied by the Court.<sup>68</sup> Judge Keenan also wrote a concurring opinion in which she agreed with the majority opinion’s decision and reasoning, but wrote separately to explain why she believed the Court was permitted to apply the modified categorical approach.<sup>69</sup> In a concurring opinion, Judge Wilkinson noted that he did not adopt the majority opinion, indicating “too many courts are too

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57. *Id.* at 441 (quoting *United States v. Pierce*, 278 F.3d 282, 290 (4th Cir. 2002)).

58. *Id.* at 442.

59. *Id.*

60. *Id.*

61. *Id.*

62. *United States v. Vann*, 660 F.3d 771, 773 (4th Cir. 2011) (Duncan, J. recused).

63. *Id.*

64. *Id.* at 773-74 (en banc with Traxler, J., Wilkinson, J., Motz, J., King, J., Gregory, J., Agee, J., Davis, J., Keenan, J., Wynn, J., and Diaz, J. voting that Vann’s enhanced sentence be vacated).

65. *Id.*

66. *Id.*

67. *Id.* at 776-77.

68. *Id.* at 787 (King, J., concurring and joined by Motz, J., Gregory, J., and Davis, J.); *See also id.* at 782 (arguing that the North Carolina Indecent Liberties Statute criminalizes one offense as interpreted by the North Carolina courts).

69. *Id.* at 798, 801 (Traxler, J., concurring and joined by Agee, J., Wynn, J., and Diaz, J.).

deep in the weeds on the matter of the ACCA's residual clause . . . ."<sup>70</sup> As such, Judge Wilkinson focused on the intent of the ACCA and concluded that the Court appropriately applied the modified categorical approach.<sup>71</sup> Dissenting, Judge Niemeyer reiterated his conclusion in the panel opinion that North Carolina's Indecent Liberties Statute criminalizes two offenses; therefore, the majority was correct to apply the modified categorical approach.<sup>72</sup> However, Judge Niemeyer noted that the majority was incorrect to conclude that Vann's guilty plea does not evidence that Vann pleaded guilty to subsection (a)(2) of North Carolina's Indecent Liberties Statute, which would be considered violent in nature under the ACCA.<sup>73</sup>

### III. BACKGROUND

Pursuant to 18 U.S.C. § 922(g)(1), it is unlawful for a person who has been convicted previously of a felony to possess a firearm.<sup>74</sup> A defendant convicted of a violation of § 922(g)(1) is subject to the sentence enhancement pursuant to § 924(e) provided the underlying conviction is a violent felony for ACCA purposes.<sup>75</sup> A prior felony conviction is a qualifying ACCA violent felony if it requires the use of physical force, is a burglary, arson, extortion, involves the use of explosives, or presents a serious risk of physical injury to another similar to the risk associated with the offenses listed above.<sup>76</sup> The issue before the Fourth Circuit in *Vann* was whether North Carolina's Indecent Liberties Statute involves conduct that presents a serious potential risk of physical injury to another, thus qualifying as a violent felony pursuant to § 924(e).<sup>77</sup>

#### A. *The United States Supreme Court's Guidance*

The Supreme Court has provided a road map for federal courts to use in determining whether a prior conviction is a violent felony within the meaning of the ACCA and thus, warrants enhanced sentencing. In *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court explained that a sentencing court, in applying § 944(e), must

70. *Id.* at 801.

71. *Id.* at 801-02 ("It cannot have been the intent of Congress to categorically sweep up all sorts of non-violent indecent liberties offenses as predicate ACCA crimes. Neither, however, can it possibly have been the intent of Congress to categorically exclude as predicates those crimes where minors were victimized by violent sexual assaults. For the reasons that follow, I believe the court has no choice but to adopt in this case a modified categorical approach.").

72. *Id.* at 807.

73. *Id.* at 808.

74. 18 U.S.C. § 922(g)(1) (2006).

75. *Id.* § 924(e).

76. *Id.* § 924(e)(2)(B).

77. *Vann*, 660 F.3d at 778.

employ a “formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions” to determine whether the prior conviction is a violent felony.<sup>78</sup> “That is, [the court must] consider whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender.”<sup>79</sup> The Court went on to describe an alternate procedure coined the modified categorical approach.<sup>80</sup> Starting from *Taylor*, the Supreme Court has explained that the modified categorical approach is only proper in limited circumstances when a statute “cover[s] several different generic crimes, some of which require violent force and some of which do not . . . .”<sup>81</sup> In applying the modified categorical approach, and for the limited purpose of identifying the elements of the prior felony conviction, a court may use the charging documents and the record of conviction, in addition to the statutory definition of the offense.<sup>82</sup> Since *Taylor*, the Supreme Court has held that a court may analyze the “statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.”<sup>83</sup> However, the Supreme Court refused to expand the scope of a court’s analysis to police reports or complaint applications.<sup>84</sup>

Before a court can determine whether to apply the modified categorical approach or the categorical approach to determine whether the prior offenses are violent felonies for ACCA purposes, a court must determine whether the statute at issue prohibits one offense or

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78. *Taylor v. United States*, 495 U.S. 575, 600-01 (1990) (reasoning the categorical approach should be applied because (1) the language of 18 U.S.C. § 924(e) supports the inference that the facts underlying the convictions should not be considered, given that the text indicates “a person who . . . has three previous convictions” for — not a person who has committed — three previous violent felonies or drug offenses” (2) the legislative history shows Congress employed the categorical approach, and (3) a factual approach is not practical and may yield unfair results).

79. *James v. United States*, 550 U.S. 192, 202 (2007).

80. *Id.* at 227 n.5 (Scalia, J., dissenting).

81. *Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010). *See also* *Nijhawan v. Holder*, 129 S. Ct. 2294, 2299 (2009) (“We also noted that the categorical method is not always easy to apply. That is because sometimes a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately. And it can happen that some of these crimes involve violence while others do not.”); *Taylor*, 495 U.S. at 602 (providing in part that “in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.”).

82. *See Taylor*, 495 U.S. at 602.

83. *Shepard v. United States*, 544 U.S. 13, 16 (2005) (These documents are known as “Shepard-approved documents.”).

84. *Id.*

multiple offenses.<sup>85</sup> Thus, the core question before the Fourth Circuit in *Vann* was whether North Carolina's Indecent Liberties Statute comprises a single offense or multiple offenses.<sup>86</sup> The interpretation of the statute, including the elements of the offense, must be determined by North Carolina law.<sup>87</sup> "Neither [the United States Supreme] Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state."<sup>88</sup> "[A] federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even though it thinks the rule is unsound in principle or that another is preferable."<sup>89</sup> The Fourth Circuit has further explained that "only if the decision of a state's intermediate court cannot be reconciled with state statutes, or decisions of the state's highest court, or both, may a federal court . . . refuse to follow it."<sup>90</sup>

### B. *The Legislative History of North Carolina's Indecent Liberties Statute*

On April 29, 1955, the General Assembly of North Carolina enacted the Indecent Liberties Statute under N.C. Gen. Stat. § 14-202.1.<sup>91</sup> "The purpose of the statute is to give broader protection to children than the prior laws provided."<sup>92</sup> The Statute originally provided in pertinent part:

Section 1. Any person over 16 years of age who, with intent to commit an unnatural sexual act, shall take, or attempt to take, any immoral, improper, or indecent liberties with any child of either sex, under the age of 16 years, or who shall, with such intent, commit, or attempt to commit, any lewd or lascivious act upon or with the body, or any part or member thereof, of such child, shall, for the first offense, be guilty of a misdemeanor and for a second or subsequent offense shall be

85. See *Johnson*, 130 S. Ct. at 1273 (noting that the modified categorical approach is only employed where the defendant is convicted under a statute that covers multiple offenses).

86. *United States v. Vann*, 660 F.3d 771,784 (4th Cir. 2011).

87. See *Johnson*, 130 S. Ct. at 1269 ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2)."). See also *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (requiring federal courts to apply state law when deciding questions of substantive law).

88. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). See also *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103, 107 (1939) (providing that where the case is removed from Texas state court, it is the duty of the federal court to apply the law of Texas as declared by the state's highest court).

89. *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236-37 (1940).

90. *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998).

91. Act of Apr. 29, 1955, ch. 764, 1955 N.C. Sess. Laws 708 [hereinafter *1955 Session Law*] (current version at N.C. Gen. Stat. § 14-202.1 (2011)).

92. *State v. Turman*, 278 S.E.2d 574, 575 (N.C. Ct. App. 1981) (citing *State v. Harward*, 142 S.E.2d 691 (N.C. 1965)).

guilty of a felony, and shall be fined or imprisoned in the discretion of the court.<sup>93</sup>

The purpose of the 1975 amendment to the Statute was “to delete the requirement of intent to commit an unnatural sex act from the crime of taking indecent liberties with children and to increase the punishment.”<sup>94</sup> Unlike the original Statute, the amended Statute did not appear visually as a single offense. However, textually, the amended statute was similar to the original statute providing in pertinent part:

Taking indecent liberties with children.— (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

(b) Taking indecent liberties with children is a felony punishable by a fine, imprisonment for not more than ten years, or both.<sup>95</sup>

Since 1975, the text of the Statute has remained relatively the same.<sup>96</sup>

### C. *North Carolina State Case Law Regarding the Interpretation of North Carolina's Indecent Liberties Statute*

In *State v. Banks*, 370 S.E.2d 398 (N.C. 1988), the Supreme Court of North Carolina explained that the legislature's revision of the Indecent Liberties Statute that resulted in two subsections did not result in a substantive change in the Statute.<sup>97</sup> The Court noted that the elements of the present Statute include “the age requirements . . . under subsection (1) an ‘immoral, improper, or indecent’ liberty committed ‘for the purpose of arousing or gratifying sexual desire’ and under sub-

93. 1955 Session Law, *supra* note 91.

94. Act of Oct. 1, 1975, ch. 779, 1975 N.C. Sess. Laws 1105 (current version at N.C. Gen. Stat. § 14-202.1 (2011)) (senate bill entitled “An Act to Amend G.S. 14-202.1 to Delete the Requirement of Intent to Commit an Unnatural Sex Act From the Crime of Taking Indecent Liberties with Children and to Increase the Punishment”) [hereinafter *1975 Session Law*]. See generally *State v. Harward*, 142 S.E.2d 691 (N.C. 1965) (“The court has the right to look to the title of an ambiguous statute for the purpose of determining the meaning thereof and the legislative intent” (citing *State v. Keller*, 199 S.E. 620 (N.C. 1938); *State v. Woolard*, 25 S.E. 719 (N.C. 1896))).

95. 1975 Session Law, *supra* note 94.

96. See Act of June 4, 1979, ch. 760, 1979 N.C. Sess. Laws 866 (replacing the phrase “a felony punishable by a fine, imprisonment for not more than 10 years, or both” with “punishable as a Class H felony”); Act of July 24, 1993, ch. 539, 1993 N.C. Sess. Laws 2788 (replacing the phrase “punishable as a Class H felony” with “punishable as a Class F felony”).

97. *State v. Banks*, 370 S.E.2d 398, 407 (1988). See also *State v. Swann*, 370 S.E.2d 533, 539-40 (N.C. 1988) (comparing the offense of taking indecent liberties with a child as described in N.C. Gen. Stat. § 14-202.1 to first degree sexual assault, a single offense crime, and the noting similarities between the two statutes).

section (2), a 'lewd or lascivious act upon or with the body or any part or member of the body' of the child."<sup>98</sup> Thus, it can be implied that subsections (a)(1) and (a)(2) of the Indecent Liberties Statute criminalize two distinct offenses.

However, two years later the Supreme Court of North Carolina explained in *State v. Hartness*, 391 S.E.2d 177 (N.C. 1990), that the Indecent Liberties Statute, "indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts."<sup>99</sup> In *Hartness*, defendant was convicted at the trial level in violation of the Indecent Liberties Statute.<sup>100</sup> Defendant appealed maintaining that the trial court committed plain error that improperly permitted his conviction by less than a unanimous verdict<sup>101</sup> given that the jury was instructed that in order to find defendant guilty of indecent liberties, the State must prove "[t]hat the defendant wilfully [sic] took an indecent liberty with a child for the purpose of arousing or gratifying sexual desire."<sup>102</sup> The trial court further described an indecent liberty as, "an immoral, improper or indecent touching or act by the defendant upon the child, or an inducement by the defendant of an immoral or indecent touching by the child."<sup>103</sup> The Supreme Court of North Carolina found that the particular act performed is immaterial<sup>104</sup> and that "[d]efendant's purpose for committing such act is the gravamen of this offense."<sup>105</sup> In its analysis, the Court reviewed the holding in *State v. Diaz*, 346 S.E.2d 488 (N.C. 1986), a drug trafficking case in which the jury was instructed that a defendant should be found guilty if it found defendant either possessed or transported marijuana.<sup>106</sup> On review, the Supreme Court of North Carolina held that possessing and transporting

98. *Banks*, 370 S.E.2d at 407 (quoting N.C. Gen Stat. §14-202.1 and noting that putting ones tongue in a child's ears, mouth or nose can be penalized under either subsection).

99. *State v. Hartness*, 391 S.E.2d 177, 180 (N.C. 1990) (reasoning is arguably ambiguous because, when referring to the Statute, the Court only references subsection (a)(1)).

100. *Id.* at 178 ("Defendant was indicted for one count of first-degree rape, two counts of first-degree sexual offense, two counts of felony child abuse, three counts of taking indecent liberties with a minor, and one count of incest. . . . Defendant was found guilty of two counts of felony child abuse and three counts of taking indecent liberties with a minor.").

101. *Id.* ("Defendant contends that the trial court's disjunctive phrasing as to the acts allegedly constituting indecent liberties in this case – defendant's touching of his stepson or the stepson's touching of defendant – rendered the verdict potentially nonunanimous.").

102. *Id.*

103. *Id.* ("The State's evidence tended to show that defendant engaged in various forms of sexual relations with his daughter, who was seven years old at the time of trial, and his stepson, who was nine years old at the time of trial. The boy testified at trial that defendant touched the boy's 'hotdog' with both his hands and his mouth. The boy identified his 'hotdog' as his penis and additionally testified that defendant induced him to touch defendant's penis with his hands and mouth.").

104. *Id.* at 180.

105. *Id.*

106. *Id.* at 179.

were two separate offenses under the relevant drug trafficking statute; thus, the trial court in *Diaz* erred in its jury instruction.<sup>107</sup> The *Hartness* Court then distinguished the drug trafficking statute from the Indecent Liberties Statute, finding that subsections (a)(1) and (a)(2) of the Statute describe a single offense and not two discrete criminal activities.<sup>108</sup>

In *State v. Hammett*, 642 S.E.2d 454 (N.C. Ct. App. 2007), the Court of Appeals of North Carolina further expressed that the Indecent Liberties Statute describes a single offense, noting a defendant can be found guilty of the same conduct under either subsection (a)(1) or (a)(2).<sup>109</sup> Furthermore, the Court in *Hammett* noted a defendant need not touch the victim to be found guilty under subsection (a)(2).<sup>110</sup> However, when reciting the elements of the claim, the Court consistently notes:

In order to withstand a motion to dismiss charges brought under G.S. 14-202.1(a)(1), the State must present substantial evidence of each of the following elements: (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.<sup>111</sup>

#### IV. HOLDING

While the majority in *Vann* concurred in the judgment, the Fourth Circuit judges disagreed as to the interpretation of North Carolina's Indecent Liberties Statute and the application of North Carolina case law.<sup>112</sup> In Judge King's concurring opinion, he maintains that "I am convinced that we are required by precedent to evaluate Vann's convictions under the Statute by sole resort to the categorical approach."<sup>113</sup> Judge King reasons that the Court is not "writing on a blank slate."<sup>114</sup> He emphasizes that both the state Supreme Court in *Hartness* and state's appellate courts had noted that North Carolina's

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107. *Id.*

108. *Id.* at 180.

109. *State v. Hammett*, 642 S.E.2d 454, 459 (N.C. Ct. App. 2007) ("[A]ctions of masturbation while lying in the same bed as C.H. and watching a pornographic movie were prohibited by G.S. § 14-202.1(a)(2)"). See also *State v. Kistle*, 297 S.E.2d 626, 628 (N.C. Ct. App. 1982) (finding no error in the defendant's conviction under N.C. Gen. Stat. § 14-202.1 for taking photographs of a nude female child in a sexually suggestive position).

110. *Hammett*, 642 S.E.2d at 459.

111. *State v. Every*, 578 S.E.2d 642, 647 (N.C. Ct. App. 2003) (referencing subsection N.C. Gen. Stat. § 14-202.1(a)(1) to the exclusion of subsection (a)(2)).

112. *United States v. Vann*, 660 F.3d 771, 772 (4th Cir. 2011).

113. *Id.* at 777 (King, J., concurring).

114. *Id.* at 782.

Indecent Liberties Statute encapsulates a single offense.<sup>115</sup> Thus, the Court is bound to apply the categorical approach.<sup>116</sup> When applying the categorical approach the prior convictions fail and cannot count for ACCA purposes.<sup>117</sup>

However, in Judge Keenan's concurring opinion she explains that the Court is permitted to apply the modified categorical approach because the Supreme Court of North Carolina in *Hartness* noted that the "single wrong is established by a finding of various alternative elements."<sup>118</sup> Judge Keenan explains that a textual reading of the statute supports the proposition that alternative elements are found in both subsections (a)(1) and (a)(2) of the Statute.<sup>119</sup> Thus, Judge Keenan reasons that because the behavior described in subsection (a)(1) differs so significantly from subsection (a)(2), conceptually, the two subsections describe different crimes.<sup>120</sup>

## V. ANALYSIS

*Vann* required the Fourth Circuit to weave through the intricacies of North Carolina law in order to address a core question of the litigation; whether the Indecent Liberties Statute encapsulates one offense or multiple offenses.<sup>121</sup> *Vann* maintained that the Statute consists of one offense.<sup>122</sup> The government argued that the Statute consists of multiple offenses.<sup>123</sup> The majority en banc panel concluded that the Statute contains a single offense that can be established by multiple

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115. *Id.* at 783.

116. *Id.*

117. *Id.* at 782. *See also id.* at 779 (noting that, because *Vann*'s prior convictions under the Indecent Liberties Statute did not (1) include an element of force, (2) were not for burglary, arson, or extortion, and (3) did not involve explosives, to qualify as a violent felony under the ACCA, the prior offenses would have to fall within the residual clause).

118. *Id.* at 798 (Keenan, J., concurring) (quoting *State v. Hartness*, 391 S.E.2d 177, 180 (N.C. 1990)) (explaining that Judge King's concurring opinion that "characterize[s] the statute as a single offense, without more, oversimplifies the Supreme Court of North Carolina's holding in *Hartness*").

119. *Id.* at 799. *See also id.* at 800 n.1 (disagreeing with Judge King's proposition, Judge Keenan notes that she does not accept the proposition that the two subsections of the Indecent Liberties Statute set out five fixed elements rather than alternative elements).

120. *Id.* at 799. *See also id.* at 813-14 (Niemeyer, J., concurring in part) (applying the same reasoning that the two subsections set out alternative elements, and marshalling additional support for his position by noting that the Indecent Liberties Statute corresponds with two different sections of Model Penal Code).

121. *Id.* at 784.

122. *See id.* at 781 (arguing that the categorical approach, used where the statute describes a single offense, should be applied; thus, implying that the statute has only one offense).

123. *Id.* (arguing that the modified categorical approach, used where the statute describes multiple offenses, should be applied).



elements.<sup>124</sup> The minority en banc panel concluded that the Statute contains a single offense.<sup>125</sup>

The Supreme Court of North Carolina applied the same reading of the Indecent Liberties Statute as the Court in *Vann* with regard to the precise question of whether the Statute encompasses a single offense or multiple offenses explaining in *Hartness* that “[a]s the statute indicates, the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts.”<sup>126</sup> Furthermore, the state Supreme Court reasoned that many different types of behavior can satisfy the single offense.<sup>127</sup> Likewise, the Court of Appeals of North Carolina has consistently interpreted North Carolina’s Indecent Liberties Statute to consist of a single offense.<sup>128</sup> Citing *Hartness*, the Court of Appeals reasoned in *State v. Jones*, 616 S.E.2d 15 (N.C. Ct. App. 2005), that a “single act can only support one conviction” under the Statute, and not two convictions.<sup>129</sup>

Judge Keenan reasoned that it would be an incomplete analysis if the Fourth Circuit were to simply accept the Supreme Court of North Carolina’s indication in *Hartness* that the Statute is a single offense without noting that the Statute imposes alternative elements for satisfying the single offense.<sup>130</sup> Judge King, however, found the language that the Statute encompasses “a single offense” definitive<sup>131</sup> noting that North Carolina courts have consistently rejected the notion that subsections (a)(1) and (a)(2) are separate offenses with separate elements.<sup>132</sup> Accordingly, the Fourth Circuit could not reconcile its views, particularly because the North Carolina court’s interpretation of the Indecent Liberties Statute is obscure.

For example, in *Banks*, the Supreme Court of North Carolina noted that there are separate elements under subsections (a)(1) and (a)(2) of the Statute:

Under the present statute the state, in addition to the age requirements, must prove under subsection (1) an “immoral, improper, or indecent” liberty committed “for the purpose of arousing or gratifying sexual desire” and under subsection (2), a “lewd or lascivious act upon or with the body or any part or member of the body” of the child.<sup>133</sup>

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124. *Id.* at 799 (Keenan, J. concurring).

125. *Id.* at 784 (King, J. concurring).

126. *State v. Hartness*, 391 S.E.2d 177, 180 (N.C. 1990).

127. *Id.*

128. See *infra* notes 135-38 and accompanying text.

129. *State v. Jones*, 616 S.E.2d 15, 20 (N.C. Ct. App. 2005).

130. *Vann*, 660 F.3d at 799.

131. *Id.* at 782, 791.

132. *Id.*

133. *State v. Banks*, 370 S.E.2d 398, 407 (N.C. 1988).

However, the reasoning of the Court in *Banks* weakened the Court's indication that there are separate elements under subsections (a)(1) and (a)(2), given that it found the "conduct [of kissing] falls within the purview of both subsections of the statute."<sup>134</sup> Furthermore, the Court of Appeals noted that the elements pursuant to the Indecent Liberties Statute are:

(1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.<sup>135</sup>

To complicate matters more, North Carolina's courts have consistently held that a defendant may be convicted pursuant to either subsection (a)(1) or (a)(2) of the Statute for the same behavior, thus implying that there is no practical difference in the subsections. The Court in *State v. Turgeon*, 261 S.E.2d 501 (N.C. Ct. App. 1980), held that physical contact is not necessary to be actionable under subsection (a)(1) and that taking sexual photos of the victims is actionable.<sup>136</sup> In *State v. Hammett*, 642 S.E.2d 454 (N.C. Ct. App. 2007), the reasoning was extended to subsection (a)(2) given that the Court concluded physical contact is not necessary to be actionable under subsection (a)(2) and that masturbating in the presence of a child is actionable under the subsection.<sup>137</sup> Furthermore, in *State v. Kistle*, 297 S.E.2d 626 (N.C. Ct. App. 1982), the North Carolina appellate court found that a sexually suggestive photograph of a child constitutes the commission of a lewd and lascivious act upon or with the body, or a part or member thereof, in violation of subsection (a)(2) of the Indecent Liberties Statute.<sup>138</sup> Moreover, in *Jones*, the North Carolina appellate court convicted a defendant that had sex with his stepdaughter, which resulted in pregnancy, under subsection (a)(1) of the Statute.<sup>139</sup> Thus, it is not surprising that the Fourth Circuit split on its interpretation of the Statute.

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134. *Id.*

135. *State v. Every*, 578 S.E.2d 642, 647 (N.C. Ct. App. 2003).

136. *State v. Turgeon*, 261 S.E.2d 501, 503 (N.C. Ct. App. 1980) (holding that no touching is necessary to violate the Statute). *See also* *State v. Turman*, 278 S.E.2d 574, 575 (N.C. Ct. App. 1981) ("We reject the argument and hold that it is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of N.C.G.S. 14-202.1. The purpose of the statute is to give broader protection to children than the prior laws provided. The word 'with' is not limited to mean only a physical touching." (citations omitted)).

137. *State v. Hammett*, 642 S.E.2d 454, 459 (N.C. Ct. App. 2007).

138. *State v. Kistle*, 297 S.E.2d 626, 628 (N.C. Ct. App. 1982).

139. *State v. Jones*, 616 S.E.2d 15, 17, 20 (N.C. Ct. App. 2005).

At first glance it appears that *Hartness* provided the Fourth Circuit with a complete answer. However, the ambiguity in *Hartness* did nothing more than further complicate the analysis. In this instance, Judge Keenan employed a literal interpretation of *Hartness*,<sup>140</sup> while Judge King relied on the Supreme Court of North Carolina's and the state appellate court's application of the Indecent Liberties Statute to inform its ruling in *Hartness*.<sup>141</sup> Fortunately for Vann, the reasoning was not outcome determinative.<sup>142</sup> As Judge King noted, "[e]ither approach produces the same result in Vann's case, but tomorrow is another day."<sup>143</sup> However, the Fourth Circuit's holding produces at least two constitutional problems tomorrow: issues of federalism and equal protection.

First, in deciding that North Carolina's Indecent Liberty Statute is one offense with separate elements, the Fourth Circuit's en banc majority rule cannot be reconciled with North Carolina's appellate court precedent.<sup>144</sup> Thus, the Fourth Circuit runs the risk of having its opinion overruled by the Supreme Court of North Carolina.<sup>145</sup> In doing so, the Supreme Court of North Carolina would be exercising the power similar to the Supreme Court of the United States; except, of course, that the reversal would provide no remedy to the litigants adversely affected by the federal court's erroneous holding.<sup>146</sup>

Secondly, in deciding that North Carolina's Indecent Liberties Statute in practicality encapsulates multiple offenses, the majority applied the modified categorical approach.<sup>147</sup> This conflicts with other jurisdictions that have interpreted North Carolina's Indecent Liberties

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140. *United States v. Vann*, 660 F.3d 771, 800 n.1 (4th Cir. 2011) (Keenan, J., concurring) (noting that, in her opinion, Judge King's conclusion, informed by the state's courts of appeals decisions, which indicates the Indecent Liberties Statute encompasses five fixed elements cannot be reconciled with the *Hartness* decision). See generally *Cannon v. Miller*, 327 S.E.2d 888 (N.C. 1985) (mem.) (noting explicitly that the Court of Appeals of North Carolina does not have the authority to overrule decisions of the Supreme Court of North Carolina).

141. *Vann*, 660 F.3d at 782 (King, J., dissenting) (citing the Court of Appeals of North Carolina's interpretation of the Statute to supplement and inform the federal court's understanding of the *Hartness* decision).

142. *Id.* at 777.

143. *Id.*

144. *Id.* at 784. Compare *id.* at 799, 800 n.1 (Keenan, J., dissenting) (disagreeing with Judge King's proposition that the Statute, including both subsection (a)(1) and subsection (a)(2), sets forth five fixed elements, but rather that it provides alternative elements for different behaviors constituting an offense under the Statute), with *State v. Coleman*, 684 S.E.2d 513, 519 (N.C. Ct. App. 2009) (listing five elements of an offense under the Statute).

145. See John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 415 n.11 (1988) (listing cases where state courts disagree with the federal courts' interpretations of state law).

146. See *United States v. Prince-Oyibo*, 320 F.3d 494, 498 (4th Cir. 2003) (noting a court of appeals panel is bound by decisions of prior panels "[a]bsent an en banc overruling or a superseding contrary decision of the Supreme Court").

147. *Vann*, 660 F.3d at 798.

Statute.<sup>148</sup> Therefore, depending on the jurisdiction a defendant is sentenced in, the defendant's sentence may be enhanced under federal guidelines based upon a federal court's interpretation of North Carolina law. Thus, for North Carolinians (or more precisely, anyone with a North Carolina conviction under the Statute) the pre-*Erie* days are not over and despite the federal court's request for a certification process,<sup>149</sup> North Carolina has not adopted a certification procedure. This problem will persist, especially in light of the ACCA and other enhanced sentencing statutes that require federal courts to analyze state statutes. Consequently, citizens of North Carolina are not afforded equal protection under the laws of the state.<sup>150</sup> Both of these problems could possibly be alleviated if North Carolina were to enact a certification procedure and clarify ambiguities of its laws.<sup>151</sup>

148. See *United States v. Witscher*, No.10-09E, 2011 U.S. Dist. LEXIS 64755, at \*6 (W.D. Pa. June 8, 2011) (applying the categorical approach to determine that a violation under subsection (a)(2) of the Indecent Liberties Statute is not a crime of violence under the federal Career Offender Act); *United States v. Izaguirre-Flores*, 405 F.3d 270, 278 (5th Cir. 2005) (applying the categorical approach, hence "a common sense approach" to determine that conduct criminalized by the Statute constitutes "sexual abuse of a minor"); *United States v. Martinez-Vazquez*, No. 09-10184, 2010 U.S. App. LEXIS 26747, at \*4-5 (9th Cir. Dec. 14, 2010) (applying the modified categorical approach to determine that conduct criminalized under the Statute is a crime of violence under the federal sentencing guidelines); *United States v. Ramirez-Garcia*, 646 F.3d 778, 783-84 (11th Cir. 2011) (applying the categorical approach to determine that conduct criminalized by the Statute is no broader than "sexual abuse of a minor").

149. See *MLC Auto., LLC v. Town of S. Pines*, 532 F.3d 269, 284 (4th Cir. 2008) ("Compounding this lack of clarity is that North Carolina currently has no mechanism for us to certify questions of state law to its Supreme Court . . . Based on the foregoing discussion, we ultimately conclude that the district court did not abuse its discretion in abstaining and staying the case under *Burford*." (citation omitted)); *Parmalat Capital Fin. Ltd. v. Bank of Am. Corp.*, 412 Fed. App'x. 325, 327 n.2 (2d Cir. 2011) (unpublished) ("We cannot seek guidance from the Supreme Court of North Carolina, however, because North Carolina has no procedure by which to certify questions of state law to its Supreme Court."); *Klein v. Depuy, Inc.*, 506 F.3d 553, 556 n.5 (7th Cir. 2007) ("Currently, North Carolina does not allow us to certify an unsettled question of state law to its Supreme Court for resolution"); *Nationwide Tr. Serv. Inc. v. Lowenthal*, No. 1:10-CV-192-GCM, 2011 U.S. Dist. LEXIS 53874, at \*6-7 (W.D.N.C. May 18, 2011) (abstaining because North Carolina does not have a certification process); *In re Saturn L-Series Timing Chain Prods. Liab. Litig.*, No. 1920, 08:07cv298, 08:08cv79, 2008 U.S. Dist. LEXIS 109978, at \*52 n.10 (D. Neb. Nov. 7, 2008) ("This Court did certify this question of law to the North Carolina Supreme Court on September 10, 2008. To date, the North Carolina Supreme Court has offered no response. Consequently, the Court is left to apply its own interpretation of North Carolina's law to this legal question" (citation omitted)). See also Jessica Smith, *Avoiding Prognostication and Promoting Federalism: The Need for an Inter-Jurisdictional Certification Procedure in North Carolina*, 77 N.C. L. Rev. 2123, 2194 n.94 (1999) (listing additional cases in which courts have expressed its interest in a certification procedure).

150. See *supra* note 148 and accompanying text.

151. Eisenberg, *supra* note 1 (arguing that North Carolina can and should adopt a certification procedure).

## VI. CONCLUSION

“Hope for the best and prepare for the worst.”<sup>152</sup> A certification procedure would ensure that the Supreme Court of North Carolina is the final arbiter of issues essential to the State. In *Vann*, the Fourth Circuit tackled a complex issue of whether North Carolina’s Indecent Liberties Statute encapsulated one offense or multiple offenses.<sup>153</sup> However, along the way, the Court split in its reasoning after encountering ambiguity in North Carolina’s case law.<sup>154</sup> Perhaps, if North Carolina had a certification procedure, the Fourth Circuit would have certified the question to the State Supreme Court. While there is no guarantee that the Fourth Circuit would have certified the question to the Supreme Court of North Carolina, or that North Carolina would have answered the question, it undoubtedly offers more certainty than the current procedure: make a decision and wait for results.

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152. THE CONCISE OXFORD DICTIONARY OF PROVERBS 114, (J.A. Simpson ed., Oxford University Press, 1982).

153. *United States v. Vann*, 660 F.3d 771, 784 (4th Cir. 2011).

154. *See id.* at 793 n.4.

