PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4489

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DENNIS MACAUTHOR RICE,

Defendant – Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Asheville. Martin K. Reidinger, Chief District Judge. (1:19-cr-00015-MR-WCM-1)

Argued: March 9, 2022 Decided: June 9, 2022

Before WILKINSON, KING, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Quattlebaum wrote the opinion, in which Judge Wilkinson joined. Judge King wrote a dissenting opinion.

ARGUED: Megan Coyle Hoffman, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. Anthony Joseph Enright, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee. **ON BRIEF:** Anthony Martinez, Federal Public Defender, FEDERAL DEFENDERS OF WESTERN NORTH CAROLINA, INC., Charlotte, North Carolina, for Appellant. R. Andrew Murray, United States Attorney, William T. Stetzer, Acting United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlotte, North Carolina, for Appellee.

QUATTLEBAUM, Circuit Judge:

We are asked to decide if the North Carolina crime of assault inflicting physical injury by strangulation is a "crime of violence." Ask any person on the street and they would say of course. In fact, they would likely question our common sense for asking such an obvious question. But we must resolve this issue using the "categorical approach," not common sense. Under that approach, we do not consider whether what Rice did was violent. It was, by the way. Instead, we consider how an assault inflicting physical injury by strangulation could have been committed in situations that have nothing to do with Rice. While that inquiry can lead to confounding results, here the common-sense answer is also the legally correct one. The North Carolina crime of assault inflicting physical injury by strangulation is a crime of violence under the categorical approach. Thus, we affirm the judgment of the district court.

I.

Dennis Macauthor Rice pled guilty to violating 18 U.S.C. § 922(g), which prohibits a felon from possessing a firearm. Prior to sentencing, the Probation Office prepared a Presentence Investigation Report ("PSR"). The PSR concluded that Rice's previous North Carolina conviction for felony assault inflicting physical injury by strangulation was a crime of violence that enhanced Rice's base offense level under the United States Sentencing Guidelines. Rice's prior conviction stemmed from an incident where he put "his hand around [a woman's] neck and squeez[ed]." J.A. 114.

Rice objected to the enhancement, arguing that assault by strangulation is not a crime of violence. Had Rice prevailed on his argument, his advisory guidelines range would have been 51 to 63 months. But the district court disagreed with Rice and imposed the enhancement, resulting in an advisory guidelines range of 77 to 96 months. The district court sentenced Rice to 77 months' imprisonment.

Rice timely appealed his sentence, and we have jurisdiction to review under 28 U.S.C. § 1291.

II.

A.

Section 2K2.1(a)(2) of the United States Sentencing Guidelines provides for an enhancement of a defendant's base offense level if he has two prior "felony convictions of either a crime of violence or a controlled substance offense."[1] A crime of violence includes "any offense under . . . state law, punishable by imprisonment for a term exceeding one year, that . . . has as an element the use . . . of physical force against the person of another." USSG § 4B1.2(a)(1).[2]

To determine whether a predicate offense is a crime of violence, we use the categorical approach. *United States v. Simmons*, 917 F.3d 312, 316 (4th Cir. 2019). An

[1] Rice does not contest that a separate, prior conviction qualified as a controlled substance offense for calculating his base offense level.

[2] The comments following § 2K2.1 provide that "crime of violence" carries the same meaning as it has in § 4B1.2(a)(1). USSG § 2K2.1 cmt. n.1.

offense "qualifies as a crime of violence if all of the conduct criminalized by the statute—'including the most innocent conduct'—matches or is narrower than the Guidelines' definition of 'crime of violence.'" *United States v. Salmons*, 873 F.3d 446, 448 (4th Cir. 2017) (quoting *United States v. Diaz–Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008)). But if the statutory language defining the offense does not match and is not narrower, then "the predicate offense . . . is overbroad and not a categorical match." *Id.* Our inquiry into the most innocent conduct, or "minimum conduct criminalized by the statute[,] is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

One of the elements that a predicate crime must match is the mens rea element of a crime of violence. *Simmons*, 917 F.3d at 320–21. A predicate offense must require proof of a mens rea more culpable than recklessness and negligence to qualify as a crime of violence. *Borden v. United States*, 141 S. Ct. 1817, 1824–25 (2021) (plurality opinion) (reasoning that crimes committed with only a reckless state of mind are not crimes of violence because "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual," and "[r]eckless conduct is not aimed in that prescribed manner"); *id.* at 1835 (Thomas, J., concurring) (reasoning that "a crime that can be committed through mere recklessness does not have as an element the 'use of physical force' because that phrase has a well-understood meaning applying only to intentional acts designed to cause harm" (citation omitted)); *see*

also Leocal v. Ashcroft, 543 U.S. 1, 11 (2004) (holding that a crime requiring only a negligent state of mind is not a crime of violence).

Rice argues that assault by strangulation is not a crime of violence because it can be committed with a mens rea of culpable negligence.[3] In making this argument, he relies on *State v. Jones*, 538 S.E.2d 917 (N.C. 2000). There, the North Carolina Supreme Court held that, with respect to North Carolina assault, "actual intent" may be implied from proof of "culpable or criminal negligence." *Id*. at 923. And likewise in *United States v. Vinson*, 805 F.3d 120 (4th Cir. 2015), citing *Jones*, we explained that "North Carolina case law establishes that the defendant must act intentionally to be guilty of assault," but in practice that requisite intent can be established through proof of culpable negligence. 805 F.3d at 125–26. In other words, although North Carolina provides that the mens rea required is intent, only culpable negligence is required.

If Rice's prior offense was run of the mill "assault," as criminalized under N.C. Gen. Stat. 14-33(c), he would have a point. But it is not. Our question here is about assault by strangulation. Therefore, neither *Jones* nor *Vinson* controls our inquiry.

What's more, we have held that an additional element contained in a North Carolina assault crime can satisfy the requisite mens rea required for a crime of violence. *See United States v. Townsend*, 886 F.3d 441, 445–47 (4th Cir. 2018). In *Townsend*, we addressed whether the North Carolina crime of assault with a deadly weapon with intent to kill inflicting serious injury was a crime of violence. *Id.* at 444. We rejected the appellant's

[3] We review de novo whether a predicate offense is a "crime of violence" under the Sentencing Guidelines. *Simmons*, 917 F.3d at 316.

argument, which relied on *Vinson*, that all assaults in North Carolina required merely proof of culpable negligence, because the specific assault in *Townsend* required proof of the additional element of a specific intent to kill. *Id.* at 446–47. *Townsend* thus provides that where a North Carolina assault offense contains an additional element satisfying the requisite mens rea, that element may qualify the offense as a crime of violence.

B.

Besides the element of assault, the crime of assault by strangulation contains two additional elements: (1) inflicting physical injury and (2) by strangulation. We must decide if these additional elements require a purposeful, knowing or intentional state of mind. If either does, then assault by strangulation is a crime of violence.

1.

To answer this question of what intent is required by the crime assault by strangulation, we first examine whether North Carolina law expressly states that assault by strangulation can be committed negligently or recklessly. *See Johnson v. United States*, 559 U.S. 133, 138 (2010) (providing that federal courts are bound by a state high court's interpretation of "state law, including its determination of the elements" of a crime). North Carolina General Statute § 14-32.4(b),[4] which criminalizes assault by strangulation, does not specify a mens rea, nor has the North Carolina Supreme Court provided what state of mind the crime requires. But the North Carolina Court of Appeals, in *State v. Lanford*, 736

[4] "Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony." N.C. Gen. Stat. § 14-32.4(b).

S.E.2d 619 (N.C. Ct. App. 2013), provides some guidance. There, the court reviewed a defendant's challenge that there was insufficient evidence to support his conviction for assault by strangulation. *Id.* at 624. The defendant argued that the evidence presented only showed that he had placed his hands on the victim's head, neck, nose and mouth but had not applied force to the victim's trachea. *Id.* In rejecting the defendant's challenge, the court expounded upon the meaning of strangulation. It noted that it had previously approved a jury instruction on strangulation, defining it "as a form of asphyxia characterized by closure of the blood vessels and/or air passages of the neck as a result of external pressure on the neck brought about by hanging, ligat[ure] or the manual assertion of pressure." *Id.* at 624 (quoting *State v. Braxton*, 643 S.E.2d 637, 642 (N.C. Ct. App. 2007)). Quoting Webster's Ninth New Collegiate Dictionary, the court provided other possible definitions of strangulation, including "the action or process of strangling or strangulating," "the state of being strangled or strangulated" and "excessive or pathological constriction or compression of a bodily tube (as a blood vessel or a loop of intestine) that interrupts its ability to act as a passage." *Id.* (emphasis omitted). As for "strangle," the court noted that it meant "to choke to death by compressing the throat with something (as a hand or rope)" and "to obstruct seriously or fatally the normal breathing of." *Id.* at 624–25 (emphasis omitted).

Lanford suggests that strangulation requires intentional or purposeful conduct. Hanging, ligature and the manual assertion of pressure—the forms of strangulation specifically discussed—by their nature, require intentional conduct. *See id.* at 624. Take "hanging." Black's Law Dictionary defines it as "[t]he act of carrying out an execution by

suspending the person above the ground by a rope around the person's neck." *Hanging*, Black's Law Dictionary (8th ed. 2004). It is hard to imagine how someone could unintentionally suspend another from the ground by a rope, looped around the person's neck. Or how about "ligature" or its verb form "ligate"? "Ligate" means "[t]o bind with a ligature or bandage." *Ligate*, The Compact Edition of the Oxford English Dictionary (1971). "Ligature" is "[a]nything used in binding or tying" or "[t]he action of tying." *Ligature*, The Compact Edition of the Oxford English Dictionary (1971). Using an instrument, or ligature, to tie or bind someone, such that they suffer asphyxiation, cannot be accomplished by accident.[5] Last, consider "manual strangulation." For it, we need not resort to a dictionary since North Carolina's Supreme Court has provided that "[m]anual strangulation, by its very nature, may require a continued murderous effort on the part of the assailant for a period of up to four to five minutes." *State v. Artis*, 384 S.E.2d 470, 493 (N.C. 1989), *opinion vacated on other grounds*, *Artis v. North Carolina*, 494 U.S. 1023 (1990). All three types of conduct the *Lanford* court considered as examples of strangulation show, by their definitions, that they could not be accomplished absent an intentional, knowing or purposeful state of mind. And while *Lanford* does not limit

[5] While perhaps not commonly used in everyday parlance, the word "ligature" may remind readers of a literary classic. In Jonathan Swift's *Gulliver's Travels*, Gulliver wakes up to find that the Lilliputians have fastened his arms and legs to the ground. He "likewise felt several slender ligatures across [his] body, from [his] arm-pits to [his] thighs." Jonathan Swift, Gulliver's Travels 8 (Rand McNally ed., 1912) (1726). As the Lilliputians' use of ligatures was plainly intentional and purposeful, even *Gulliver's Travels* supports our conclusion.

strangulation to hanging, ligature and manual strangulation, the other definitions of strangulation it describes do not suggest one could strangle another without intent.

In sum, even if not expressly stated, North Carolina law suggests that assault by strangulation requires intentional conduct.

2.

We next consider the meaning of strangulation "to a person of ordinary intelligence." *See State v. Wiggins*, 158 S.E.2d 37, 42 (N.C. 1967) (requiring North Carolina statutes to be construed giving words their "ordinary meaning"); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 69 (2012). No ordinary person would say that a person could strangle another without a purposeful, knowing or intentional state of mind. Implicit in the act of strangulation is the understanding that a perpetrator uses his or her hands, or a tool or other instrument, and

wraps them around or applies pressure to a victim to obstruct their breathing. A person cannot commit the act of strangling without knowing or intending it.[6]

[6] An emerging tool of statutory construction, *corpus linguistics*, leads to the same result. "Corpus linguistics is the study of language (linguistics) through systematic analysis of data derived from large databases of naturally occurring language (*corpora*, the plural of *corpus*, a body of language)." Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. Pa. L. Rev. 261, 289 (2019). While the name may sound complicated, utilizing the tool is not. Put simply, corpus linguistics allows lawyers or judges to search online databases that contain words and phrases within a specific population during a given time period. The uses can then be reviewed one by one, in their context, to determine the meaning of a word or phrase. And when the uses are reviewed as a whole, a broad picture of how a word or phrase was customarily used and understood during a specific time period can emerge. Although relatively new, corpus linguistics is gaining traction as an interpretive tool. *See e.g., Wilson v. Safelite Group, Inc.*, 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring in part and in the judgment); *State v. Rasabout*, 356 P.3d 1258, 1279–82 (Utah 2015) (Lee, A.C.J., concurring in part and in the judgment). Hopefully, this trend will continue.

Because this is a criminal statute, the way ordinary speakers of English would understand the language of the law is particularly important. *See McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[I]t is reasonable that a fair warning should be given to the world[,] in language that the common world will understand, of what the law intends to do if a certain line is passed."). For this reason, the Corpus of Contemporary American English, which contains documents an ordinary speaker of English would interact with regularly—magazine articles, newspapers, books, etc.—is an appropriate database to search. A search of that database for the use of "strangulation" from 1990 to 2004, the year North Carolina passed § 14-32.4(b), yielded 294 hits. A review of each of those hits revealed that all uses of strangulation, in the context of a person strangling someone else, where the strangler's state of mind could be determined, involved intentional or purposeful action. For example, one use described an investigation into a homicide, where the cause of death was determined to be "[a]sphyxiation caused by manual strangulation," where the "[k]iller [was] on top, [and] used both hands." In another example, a killer described his "first barehanded strangulation" with nostalgia. To be fair, the uses of strangulation did not explicitly state that the strangulation was intentional, purposeful or knowing. But a review of the context surrounding use of the word makes clear that the strangulation was intentional, knowing or purposeful, or at least that it was not reckless or negligent. A small percentage of uses pertained to the risks of consumer products as opposed to an individual doing the strangling. Importantly, however, there were no examples of an individual strangling another person in a way that stated or implied the strangulation was negligent or reckless. In addition, for completeness, searches of several variations of "strangulation"

Decisions from North Carolina support our conclusion. Rice cannot point to a single case where North Carolina obtained, or much less sought, a conviction for assault by strangulation where the defendant did not knowingly, purposefully or intentionally strangle their victim. If one could commit assault by strangulation in North Carolina with a reckless or culpably negligent state of mind, it is odd that, in the nearly eighteen years since the crime has been on the books, there has not been a single case involving the prosecution of a defendant for acts suggesting a reckless or culpably negligent state of mind.

In contrast, there are many cases where a defendant was prosecuted for assault by strangulation and the facts suggested a purposeful, knowing or intentional state of mind. *See, e.g., State v. Prince*, 805 S.E.2d 304, 306 (N.C. Ct. App. 2017) (describing a defendant "wrapp[ing] his arm around [a minor's] neck and chok[ing] him, such that [he] was unable to 'really breathe' and he was 'gasping for air'"); *State v. Lowery*, 743 S.E.2d 696, 698 (N.C. Ct. App. 2013) (describing a defendant pushing a victim to the ground before getting on top of her and "strangl[ing] her with his hands" such that she "couldn't breathe for a while"); *State v. Williams*, 689 S.E.2d 412, 415 (N.C. Ct. App. 2009) (describing a defendant putting his foot on a victim's neck and pressing down with his weight). In fact, by our count there are at least nineteen of these cases that have proceeded to an appeal, even though there are likely many more that were not appealed.

---

were conducted. Those searches produced the same results. Thus, corpus linguistics supports the conclusion that the ordinary public meaning of strangulation at the time North Carolina passed § 14-32.4(b) involved intentional conduct.

Likewise, North Carolina's pattern jury instructions regarding assault by strangulation suggest intent is required. They provide:

> For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt: First, that the defendant assaulted the victim by intentionally (and without justification or excuse) strangling the victim. And second, that the defendant inflicted physical injury upon the victim.

N.C.P.I. Crim. 208.61 (emphasis omitted) (footnotes omitted). While these instructions are not North Carolina law, and thus are not dispositive on our issue, they constitute additional evidence that § 14-32.4(b) cannot be committed without intentional conduct. *See United States v. Allred*, 942 F.3d 641, 650 (4th Cir. 2019).

Although our focus up to this point has been on the element "by strangulation," the other additional element—"inflicting physical injury"—confirms our conclusion that assault by strangulation cannot be committed without an intentional, knowing or purposeful state of mind. In a separate statute criminalizing child abuse, the North Carolina Court of Appeals interpreted the word "inflict" as used in that statute: "The word 'inflict' means to lay on or impose . . . . Thus, to violate the statute, an intentional, rather than accidental, act causing physical injury is required." *State v. Young*, 312 S.E.2d 665, 668 (N.C. Ct. App. 1984) (citing 43 C.J.S. *Inflict* p. 707 (1978)), *overruled by State v. Phillips*, 399 S.E.2d 293, 303 (N.C. 1991) (recognizing that *State v. Campbell*, 340 S.E.2d 474 (1986) overruled *Young*'s conclusion that a defendant must have also intentionally caused the injury, not just acted intentionally). The conclusion the *Young* court made—that "inflict" requires an intentional state of mind—was left undisturbed by *Campbell*, and rightfully so. Strangulation by itself requires an intentional, knowing or purposeful state of

mind, and to add that strangulation was *inflicted* by someone leaves no doubt. Strangulation is not the result of a negligent or reckless act, but it is imposed upon someone through intentional, knowing or purposeful conduct.

3.

Rice makes several arguments against our conclusion. First, he argues the categorical approach does not require reported cases involving prosecution of assault by strangulation based on negligence or recklessness. Instead, he insists the proper inquiry is what North Carolina could punish under the statute, not what it does punish. On that general principle, he is correct. Indeed, our recent decision in *United States v. Proctor*, 28 F.4th 538 (4th Cir. 2022), makes that clear. Citing our decision in *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc), *Proctor* held that a defendant's inability to cite a prosecuted case "is by no means dispositive." 28 F.4th at 552.

But not dispositive does not mean irrelevant. No matter how you slice it, nineteen to zip is strong evidence that the statute does not cover negligent or reckless conduct. *See, e.g., United States v. Covington*, 880 F.3d 129, 135 (4th Cir. 2018) ("Here, [the defendant] has not identified a single West Virginia case that interprets the offense of unlawful wounding to apply to one who uses force that is not 'capable of causing physical pain or injury to another person.'"); *United States v. Bell*, 901 F.3d 455, 471 (4th Cir. 2018) ("But most importantly, [the defendant] does not identify any *actual* defendant from a Maryland case who has been prosecuted in such circumstances." (emphasis in original)); *United States v. James*, 718 F. App'x 201, 205–06 (4th Cir. 2018) ("Here, . . . the absence of illustrative cases confirms our conclusion that Virginia law does not allow for unlawful

wounding convictions based on the kind of omissions that [the defendant] imagines."); *United States v. Salmons*, 873 F.3d 446, 451 (4th Cir. 2017) ("[L]itigants must point to the statutory text or to actual cases in order to demonstrate that a conviction for a seemingly violent state crime could in fact be sustained for nonviolent conduct.").

Second, Rice argues that even if there are no reported decisions of assault by strangulation where the state brought charges for reckless or culpably negligent conduct, there are fact patterns that could lead to such prosecutions. Thus, he claims prosecution for violation of § 14-32.4(b) based on negligent or reckless conduct is a realistic possibility.

Rice provides the correct standard. As he notes, we must focus on the "realistic probability," not the "theoretic possibility" that a state would prosecute an individual for such conduct. *See Moncrieffe*, 569 U.S. at 191. And we are not to resort to "legal imagination" in determining whether there is a realistic probability that a state would prosecute an individual for such conduct. *See id.* But he applies the standard incorrectly. Rice's proposed hypotheticals are the just the sort of "theoretical possibilities" that our precedent forbids.

For example, Rice posits that a driver could run a red light and hit another car. If the passenger in the other car suffered extensive bruising on their neck from the seatbelt or the seatbelt wrapped around their neck making breathing difficult, then the driver could be convicted of assault by strangulation. Rice argues that there would be an assault, stemming from the driver's culpable negligence, and it would have inflicted physical injury by strangulation.

We disagree. Rice seems to have borrowed the car wreck hypothetical from our recent decision in *Simmons*. In *Simmons*, we noted that it was plausible that a defendant could be prosecuted for assault with a deadly weapon on a government official if he were culpably negligent in driving a car that struck a government official. 917 F.3d at 320. But that hypothetical is realistic. Such circumstances could happen. In contrast, Rice's hypothetical, while theoretically possible, has a miniscule chance of ever occurring, and there is an even lower chance of being prosecuted for such conduct. Therefore, Rice's hypothetical does not rescue his argument.

Rice's other hypotheticals also fall flat. He describes the fact patterns of several cases that he proposes could result in a prosecution for assault by strangulation under North Carolina law. But none of those cases involve the statute at issue here. In fact, none of them involve an assault-by-strangulation statute at all. They involve charges of vehicular homicide, reckless aggravated assault, reckless driving, involuntary vehicular manslaughter, leaving the scene of an accident and first-degree murder.[7] Comparing those cases to § 14-32.4(b) is like comparing apples and oranges.[8]

[7] *State v. Kennedy*, 152 S.W.3d 16, 17–18 (Tenn. Crim. App. 2004); *People v. Jackson*, No. 196484, 1998 WL 2016627, at *1 (Mich. Ct. App. Mar. 3, 1998); *State v. White*, 457 S.E.2d 841, 845–46 (N.C. 1995).

[8] The dissent cites even more cases which it claims provide "realistic examples of strangulations that occur due to culpably negligent conduct." Dissent at 23. But much like Rice's hypotheticals, none of these additional cases involve this statute or a similar statute. Rather, one case involves a petition for adjudication of a wardship for a child, and the remaining cases involve convictions for inflicting corporal injury on a cohabitant, first-degree reckless homicide and first-degree murder.

From the plain meaning of "by strangulation" and "inflicting physical injury" to North Carolina reported decisions involving assault by strangulation to consideration of "realistic probabilities," we see no indication North Carolina would prosecute a defendant for the crime of assault by strangulation except where the evidence showed that the alleged perpetrator had an intentional, knowing or purposeful state of mind. The act of strangling requires such an intent. It cannot be completed recklessly or negligently. On at least one occasion, a prosecutor for the State of North Carolina has stated in open court that "[s]trangulation does not occur . . . by accident . . . [but] takes a deliberate act." *State v. Richardson*, 402 S.E.2d 401, 405–06 (N.C. 1991). We agree. Because assault by strangulation could only be accomplished if the state proves an intentional, knowing or purposeful intent, it satisfies the mens rea requirement for a crime of violence.[9]

[9] Although the dissent suggests we previously held otherwise in *United States v. McMillian*, 652 F. App'x 186 (4th Cir. 2016), we disagree. Dissent at 23–24. In our unpublished decision in *McMillian*, a criminal defendant appealed the revocation of his term of supervised release following an arrest where he was charged with four North Carolina state criminal offenses, including assault by strangulation. 652 F. App'x at 188. We reviewed the argument that the court erred in classifying assault by strangulation as a crime of violence for plain error. *Id.* at 191. As we often do under plain error review, we merely assumed that one element of the test was met because the challenger clearly failed under a different element. *See United States v. Hare*, 820 F.3d 93, 105 (4th Cir. 2016) ("Assuming that the district court's instructions were erroneous and the error was plain, we find that the error did not affect Appellants' substantial rights."). Thus, in *McMillian* we did not review whether assault by strangulation was a crime of violence, but "[i]n the context of plain error review, we [were] content to assume" that assault by strangulation was not a crime of violence because even assuming it was, such error was not plain. 652 F. App'x at 193.

III.

The categorical approach can lead to inquiries that our fellow citizens would find absurd. *See United States v. Battle*, 927 F.3d 160, 163 n.2 (4th Cir. 2019) ("Through the *Alice in Wonderland* path known as the 'categorical approach,' we must consider whether [the defendant]'s assault of a person with the intent to murder is a crime of violence."); *cf. United States v. Scott*, 990 F.3d 94, 126–27 (2d Cir. 2021) (Park, J., concurring) (collecting cases that demonstrate the absurd questions the categorical approach requires courts to consider). This is one of those. Even so, North Carolina's crime of assault by strangulation can only be committed with an intentional, knowing or purposeful state of mind. As such, it satisfies the mens rea required to qualify as a crime of violence. Finding no error, the district court's judgment is

AFFIRMED.

KING, Circuit Judge, dissenting:

The only issue before us in this appeal is whether Dennis Rice's 2014 North Carolina offense of assault inflicting "physical injury by strangulation" qualifies as a crime of violence under the Sentencing Guidelines. *See* N.C. Gen. Stat. § 14-32.4(b) (the "strangulation offense"); USSG § 4B1.2(a)(1) (the "force clause"). Rice's offense was not a crime of violence, however, because the strangulation offense can be committed under North Carolina law with a mens rea of culpable negligence. Thus, it sweeps more broadly than what is required under the force clause. I therefore write separately and dissent.

I.

A.

1.

In assessing whether the strangulation offense qualifies as a crime of violence under the force clause, we must utilize the categorical approach. Pursuant thereto, an offense "qualifies as a crime of violence if all of the conduct criminalized by the statute — 'including the most innocent conduct' — matches or is narrower than the Guidelines' definition of 'crime of violence.'" *See United States v. Salmons*, 873 F.3d 446, 448 (4th Cir. 2017) (quoting *United States v. Diaz-Ibarra*, 522 F.3d 343, 348 (4th Cir. 2008)). That is, if the offense "can be committed without satisfying the definition of 'crime of violence,' then it is overbroad and not a categorical match" under the force clause. *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)). And when scrutinizing the most innocent conduct criminalized by a particular statute, we consider only conduct for which there is a

"realistic probability, not a theoretical possibility," the law would actually punish. *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (internal quotation marks omitted).

Additionally, the mens rea requirement of North Carolina's strangulation offense must match the mens rea required by the force clause. *See United States v. Simmons*, 917 F.3d 312, 320-21 (4th Cir. 2019). In that regard, it is important that the Supreme Court recently ruled in *Borden v. United States* that a crime capable of commission with "a less culpable mental state than purpose or knowledge" — such as "recklessness" — cannot categorically qualify as a crime of violence under the force clause. *See* 141 S. Ct. 1817, 1821-22 (2021) (plurality opinion); *id.* at 1835 (Thomas, J., concurring) (agreeing that recklessness is insufficient mens rea under force clause). Simply put, for an offense to categorically qualify as a crime of violence post-*Borden*, the offense must require a mens rea more culpable than recklessness.

2.

Against this backdrop, it is worth initially emphasizing that North Carolina has enacted multiple felony assault statutes that criminalize different types of assault. *See, e.g.*, N.C. Gen. Stat. § 14-31 (malicious assault in a secret manner); *id.* § 14-32(a) (assault with a deadly weapon with intent to kill inflicting serious injury); *id.* § 14-32.4(b) (assault inflicting physical injury by strangulation); *id.* § 14-34.2 (assault with a deadly weapon on a government official). To be sure, some North Carolina assault offenses categorically qualify as crimes of violence under the force clause. *See, e.g.*, *United States v. Townsend*, 886 F.3d 441, 445 (4th Cir. 2018) (ruling that assault with a deadly weapon with intent to kill inflicting serious injury is categorically a crime of violence). Other North Carolina

assault offenses, however, decidedly do not qualify as crimes of violence under the force clause. *See, e.g.*, *Simmons*, 917 F.3d at 321 (ruling that assault with a deadly weapon on a government official is not categorically a crime of violence).

Relevant here, the North Carolina strangulation offense underlying Rice's 2014 conviction provides that "any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony." *See* N.C. Gen. Stat. § 14-32.4(b). As explained by the Court of Appeals of North Carolina, the strangulation offense has three elements, and is completed when a person "(1) assaults another person (2) and inflicts physical injury (3) by strangulation." *See State v. Williams*, 689 S.E.2d 412, 416 (N.C. Ct. App. 2009).

Notably, the Supreme Court of North Carolina has explicitly ruled that the mens rea required for a North Carolina "assault" offense generally encompasses culpably negligent conduct. *See State v. Jones*, 538 S.E.2d 917, 923 (N.C. 2000). We recognized as much in our 2016 decision in *United States v. Vinson*, observing that "North Carolina case law establishes that [a] defendant must act intentionally to be guilty of assault," but the requisite intent can be "established through proof of culpable negligence." *See* 805 F.3d 120, 125-26 (4th Cir. 2015). And the North Carolina high court made clear in *Jones* that "culpable negligence" is "such recklessness or carelessness . . . as imports a thoughtless disregard of consequences or a heedless indifference to the safety and rights of others." *See* 538 S.E.2d at 923 (internal quotation marks omitted). That is, culpable negligence's "focus on thoughtless disregard" renders it "a lesser standard of culpability than recklessness, which

requires at least a conscious disregard of the risk." *See Vinson*, 805 F.3d at 126 (internal quotation marks omitted).

B.

On appeal, Rice maintains that, because the mens rea requirement of "assault" — as construed by North Carolina's high court — encompasses culpably negligent conduct, the strangulation offense fails to satisfy the *Borden* mandate and is therefore not a crime of violence under the force clause. In the name of "common sense," however, my good friends in the panel majority have ruled otherwise: that the strangulation offense is a crime of violence. *See ante* at 2.[1] The majority has ruled that, even though a showing of culpable negligence satisfies the mens rea requirement under the "(1) assaults another person" element, the strangulation offense's other elements — "(2) [infliction of] physical injury (3) by strangulation" — bring it into the ambit of the force clause. *See Williams*, 689 S.E.2d at 416. Those other two elements, my friends conclude, heighten the mens rea requirement of the strangulation offense to embrace only "an intentional, knowing or purposeful state of mind." *See ante* at 12-13. But my good colleagues are mistaken.

1.

Contrary to the majority, the strangulation offense does not have any additional element that increases its mens rea requirement. And my conclusion in that regard is

[1] The majority's reliance on "common sense" supports their view that this case is a "slam dunk" for the government. But the proper classification of prior convictions under the force clause requires more than common sense. That is, "we may not simply rest our decision on some concept of common sense. Instead, we are obliged to apply the categorical approach, and in doing so we are guided by circuit precedent." *See Mena v. Lynch*, 820 F.3d 114, 119 (4th Cir. 2016).

consistent with our precedent as to whether other North Carolina assault offenses categorically qualify as crimes of violence under the force clause. In our *Townsend* decision, we ruled that the North Carolina offense of assault with a deadly weapon with the intent to kill inflicting serious injury satisfies the force clause, in that "the intent to kill element . . . requires proof of a specific intent to kill." *See* 886 F.3d at 445. As *Townsend* recognized, some North Carolina assault statutes do have an "additional element" — such as a specific intent to kill — that heightens the necessary mens rea. *Id.* at 447. In contrast, our *Simmons* decision explained that a North Carolina assault with a deadly weapon on a government official is not categorically a crime of violence under the force clause. *See* 917 F.3d at 321. That North Carolina assault offense, we recognized, "can be committed with culpable negligence," and no other elements of that offense increase the requisite mens rea. *Id.*

This appeal is more analogous to *Simmons*. That is, the strangulation offense here and the assault offense underlying *Simmons* do not have any separate, distinct elements that mandate a heightened mens rea.[2]

[2] Seeking to render this case analogous to *Townsend*, the majority relates that the strangulation offense's pattern jury instruction requires that the defendant "intentionally . . . strangl[e] the victim." *See ante* at 12. That instruction, they assert, "constitute[s] additional evidence that [the strangulation offense] cannot be committed without intentional conduct." *Id.* But the majority fails to acknowledge that the same intent formulation was in the North Carolina pattern jury instructions for the assault statutes at issue in *Vinson* and *Simmons*. As we explained in *Vinson*, the pertinent instruction refers to intent only in its first clause, which describes the nature of the assault rather than the mens rea requirement. *See* 805 F.3d at 126. In these circumstances, the majority's reliance on the pattern jury instruction is misplaced.

2.

I am also unpersuaded by the majority's reliance on the "realistic-probability" test. Chiding Rice for failing to identify a North Carolina case that shows how someone could recklessly or negligently strangle another person, the majority contravenes our en banc decision in *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014). In that case, the defendant was unable to identify any example of a Maryland state conviction for a resisting arrest offense involving de minimis conduct. *Id.* at 157-58. Our en banc majority nevertheless concluded that the subject offense was not categorically a crime of violence under the force clause because state court precedent recognized that "non-violent offensive physical contact" could satisfy it. *Id.* In that circumstance, as we recognized, the realistic-probability test was satisfied. *Id.* at 158.

As a threshold matter, today's majority disregards realistic examples of strangulations that occur due to culpably negligent conduct. In fact, Rice has provided us with several good examples. *See In Interest of Carthen*, 384 N.E.2d 723, 725 (Ill. App. Ct. 1978) (strangulation occurred "accidentally" when a mother "looped [a television cord] around [her] child's neck"); *People v. Pegeron*, No. A130485, 2012 WL 826949, at *1 (Cal. Ct. App. Mar. 13, 2012) (strangulation occurred "accidentally" when defendant "looped [his arm] around [the victim's] neck" while "roughhousing"); *State v. Dehne*, No. 2011AP981-CR, 2012 WL 6012996, at *1 (Wis. Dec. 4, 2012) (strangulation occurred recklessly when a victim wearing a harness attached to an I-beam was pushed down a staircase); *see also State v. O'Carroll*, 896 A.2d 1125, 1138 (N.J. Super. Ct. App. Div. 2006) (recognizing that strangulations occur accidentally). And notably, we have recently

observed that there are "some scenario[s] in which a person could commit an assault by strangulation [under North Carolina law] without intentionally applying physical force." *See United States v. McMillian*, 652 F. App'x 186, 193 (4th Cir. 2016) (unpublished).

More importantly, the majority ignores the ruling of *Aparicio-Soria* and the conclusion that it compels: the realistic-probability test is satisfied because North Carolina courts have held that an assault can be committed with a mens rea that sweeps more broadly than what is required under the force clause. *See* 740 F.3d at 158. That fact alone removes the strangulation offense from the scope of the force clause.

II.

My friends of the panel majority pronounce that it would be "absurd" for us to rule that the strangulation offense does not categorically qualify as a crime of violence under the force clause. *See ante* at 17. But as counterintuitive as that position may seem to my good friends, North Carolina itself recognizes that the strangulation offense can be committed by an act of culpable negligence. Thus, the strangulation offense sweeps more broadly than the force clause.

I respectfully dissent.