CASE NO. 20-6812

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARTIN JAY MANLEY,
a/k/a Buck,

Defendants - Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT NEWPORT NEWS

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Appellant Martin Jay Manley pled guilty to two counts of using, brandishing, and discharging a firearm in relation to a "crime of violence," under 18 U.S.C. §§ 924(c)(1) and (j). The alleged predicate "crime[s] of violence" were murder in aid of racketeering activity, as defined in 18 U.S.C. § 1959(a)(1), and assault with a dangerous weapon in aid of racketeering activity, as defined by 18 U.S.C. § 1959(a)(3). 18 U.S.C. § 924(c)(3) defines a "crime of violence" as an offense that is a felony and either (A) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (B) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Since the Supreme Court held in *United States v. Davis*, 139 S. Ct. 2319 (2019), that clause (B) is void for vagueness, the question for this Court is whether the crimes to which Mr. Manley pled guilty satisfy the "force" clause of § 924(c)(3)(A). The answer is no, because Mr. Manley's crimes can be violated with a *mens rea* of extreme recklessness or, in some cases, recklessness or simple negligence.

Just a few weeks ago the Supreme Court held, when interpreting essentially identical language in the Armed Career Criminal Act (ACCA), that crimes permitting conviction for recklessness do not satisfy the force clause. *See Borden v. United* States, 141 S. Ct. 1817 (2021). The operative majority in *Borden* was split

between a plurality opinion written by Justice Kagan and a concurrence written by Justice Thomas. Although they disagreed about whether the holding should be located primarily in the connotations of the word "use" or the word "against," the plurality and the concurrence agreed that the statutory language requires either a purpose to apply force or at least knowledge, to a practical certainty, that force will be applied. The Court had no occasion to address whether crimes requiring "extreme" recklessness would qualify, and the plurality formally reserved that question. *See* 141 S. Ct. at 1824 (plurality op.). But both the plurality and concurrence in *Borden* agreed that a "use" of force "against" an object requires more than a failure to pay sufficient attention to risk. The state of mind that the law calls "extreme" recklessness is still recklessness. It requires a callous disregard for obvious dangers to human life, but not a purpose to target force against a person or property or knowledge that force will be applied. The *Borden* plurality specifically identified reckless driving as an example of what does *not* count as a use of force, and it is settled law that crimes requiring proof of so-called "extreme" recklessness can be committed through reckless driving.

As the Violent Crimes In Aid of Racketeering ("VICAR") statute, 18 U.S.C. § 1959, does not define "murder" and "assault with a dangerous weapon," this Court must derive generic definitions of those crimes from state law and secondary sources under the principles laid out in *Taylor v. United States*, 495 U.S. 575 (1990). It is

clear that generic murder can be committed with an extremely reckless state of mind. A survey of the nationwide law and secondary sources reveals that generic assault with a dangerous weapon can be committed through simple recklessness. Virginia case law also makes clear that the Virginia second-degree murder can be committed through extreme recklessness, and that the Virginia wounding statute requires only ordinary recklessness or at most extreme recklessness.

Because the predicate crimes identified as supporting Mr. Manley's § 924(c) convictions do not necessarily have as an element the use of force against the person or property of another, those convictions should be vacated.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Mr. Manley's motion to vacate under 28 U.S.C. § 2255(a) and 28 U.S.C. § 1331. The district court denied the motion and entered judgment against Mr. Manley by an order dated April 28, 2020. Mr. Manley timely filed his notice of appeal on June 1, 2020. *See* Fed. R. App. P. 4(B)(i). This Court has jurisdiction over the appeal under 28 U.S.C. §§ 1291 and 2253(a).

ISSUES PRESENTED

As stated in the Court's order granting a certificate of appealability, the issues presented are:

> (1) whether a violent crime in aid of racketeering ("VICAR") conviction premised on a violation of Va. Code Ann. § 18.2-51 is a crime of violence under 18 U.S.C. § 924(c)'s force clause; and

(2) whether a VICAR conviction premised on second-degree murder under Va. Code Ann. § 18.2-32 qualifies as a crime of violence under § 924(c)'s force clause.

STATEMENT OF THE CASE

A. Mr. Manley's Guilty Pleas

On March 11, 2009, a grand jury indictment return was filed charging eleven defendants with forty violations of federal law. JA-10. Mr. Manley was charged with conspiracy to engage in racketeering acts (Count 1); interference with commerce by robbery (Count 22); use, carrying, and discharge of firearm in relation to a crime of violence (Count 23); assault with a dangerous weapon in aid of racketeering activity (Count 24); discharging a firearm in relation to a crime of violence (Count 25); maiming in aid of racketeering activity (Count 33), murder in aid of racketeering activity (Count 34), and use and discharge of a firearm in relation to a crime of violence resulting in death (Count 35). *Id*.

Mr. Manley entered guilty pleas to Counts 1, 25, and 35 of the indictment on October 19, 2009. JA-84. An order accepting the guilty pleas was filed the same day. JA-102. This summary of the procedural background focuses on Counts 25 and 35, the § 924(c) charges at issue here.

Count 25 was captioned "Use, Brandish and Discharge of a Firearm in Relation to a Crime of Violence," and charged a violation of 18 U.S.C. § 924(c)(1). JA-60. The indictment stated:

> On or about October 4, 2006, in Newport News, Virginia, in the Eastern District of Virginia, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," did unlawfully and knowingly use, carry, brandish and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a Court of the United States, that is, Assault with a Dangerous Weapon in Aid of Racketeering Activity in violation of Title 18, United States Code, Section 1959(a)(3), as set forth in Count Twenty-four of this Indictment, which is realleged and incorporated herein.

Id. Count 24, in turn, alleged that Mr. Manley was part of a criminal organization that engaged in racketeering activity and used acts of violence to protect its territory. It stated:

> On or about October 4, 2006, in Newport News, Virginia, in the Eastern District of Virginia, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," did knowingly, intentionally and unlawfully assault rival gang members J.R. with a dangerous weapon, which resulted in serious bodily injury to J.R., in violation of Va. Code Ann. § 18.2-51, for the purpose of gaining entrance to and maintaining and increasing position in an Enterprise engaged in racketeering activity.

JA-58-59.

According to the statement of facts submitted with the plea agreement, the underlying conduct was shooting into a pickup truck while it attempted to leave a parking lot. JA-97. One of the truck's occupants "was struck by a bullet in the back of his left shoulder" and received treatment at a hospital. *Id.*

Count 35 of the indictment was captioned "Use and Discharge of a Firearm in Relation to a Crime of Violence Resulting in Death," and alleged that Mr. Manley violated §§ 924(c)(1) and (j). It stated that:

> On or about December 24, 2007, in Hampton, Virginia, in the Eastern District of Virginia, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," did unlawfully and knowingly use, carry, brandish and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a Court of the United States, that is, Murder in Aid of Racketeering Activity in violation of Title 18, United States Code, Section 1959(a)(1), as set forth in Count Thirty-four of this Indictment, which is realleged and incorporated herein, and in the course of said offense, caused the death of Tony Vaughan, through the use ofa firearm, and the killing constituted murder as defined in Title 18, United States Code, Section 1111(a) in that the killing was committed with malice aforethought.

JA-74. The incorporated Count 34 again alleged that Mr. Manley was part of a racketeering organization, and that:

> On or about December 24, 2007, in Hampton, Virginia, in the Eastern District of Virginia, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," did knowingly, willfully, and unlawfully cause the murder of Tony Vaughan in violation of Va. Code Ann. § 18.2-32, for the purpose of gaining entrance to and maintaining and increasing position in an Enterprise engaged in racketeering activity.

JA-72-73.

The stipulated statement of facts explains that Mr. Manley began to fight with Tony Vaughan. JA-98. Others began to beat and kick Mr. Vaughan. *Id*. Mr. Manley was pulled away from the group and handed a pistol. *Id.* He fired one shot at Mr. Vaughan, which caused his death. *Id.*

On October 19, 2009, the district court accepted Mr. Manley's guilty plea. JA-102. The order accepting the plea stated that Manley had pled guilty to an indictment charging him with "conspiracy to engage in racketeering acts (Count 1), in violation

of 18 U.S.C. § 1962(d); discharging a firearm in relation to a crime of violence (Count 25), in violation of 18 U.S.C. § 924(d); and use of a firearm resulting in death (Count 35), in violation of 18 U.S.C. § 924(c) and (j)." *Id.* The court found that the plea was knowledgeable and voluntary, and that "the offense charged is supported by an independent basis in fact, establishing each of the essential elements of such offense." JA-102-03. The plea colloquy itself has not been transcribed.

On February 26, 2010, the district court sentenced Mr. Manley to 360 months on Count 1, 120 months on Count 25, and Life on Count 35. JA-105. The 360-month sentence for Count 1 was to be served concurrently with the Life sentence, but the 120-month sentence for Count 25 was to be served consecutively with it. *Id.* On July 22, 2011, the district court reduced the sentence on Count 35 from Life to 360 months, still to be served consecutively with the 120-month sentence for Count 25. *See* JA-139.

B. Mr. Manley's § 2255 Motion and Appeal

On February 18, 2020, Mr. Manley filed a *pro se* motion under 28 U.S.C. § 2255 to vacate his convictions for Counts 25 and 35 of the indictment. JA-110. Mr. Manley argued that the "924(c) convictions are invalid because they were predicated on offenses that are longer a crime of violence" after *Davis.* JA-113, 125. The United States responded that the conduct charged in Count 35 "involved the use of physical force" because Mr. Manley shot the victim in the chest, "directly causing [his]

death." JA-136. The United States did not address why Count 25 charged a qualifying crime of violence.

The district court denied the § 2255 motion in an order dated April 28, 2020. JA-138. The court held that assault with a dangerous weapon in aid of racketeering is a crime of violence for reasons set forth in the court's prior opinion in *Ellis v. United States*, ___ F. Supp. 3d ___, No. 4:19cv115, 2020 WL 1844792. JA-140. In *Ellis*, Judge Smith had held that "[t]he elements of common law assault are the (1) willful attempt to inflict injury upon the person of another ... or (2) a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm," and that "§ 1959(a)(3) heightens this common law assault definition by additionally requiring the use of a dangerous weapon, that is, an object with the capacity to endanger life or inflict serious bodily harm." 2020 WL 1844792, at *2. Judge Smith reasoned that "[t]his definition qualifies as a crime of violence under the force clause, because it has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* (internal quotation marks omitted).

For Count 35, the district court reasoned that "[t]he common law definition of murder is the unlawful killing of another human being with malice aforethought." JA-141 (quoting *Schad v. Arizona*, 501 U.S. 624, 640 (1991)). The court concluded that "[c]ommon law murder certainly involves the use, attempted use, or threatened

use of physical force against the person." *Id.* (internal quotation marks omitted). In a footnote, the court held that the state offense identified as the predicate for the VICAR murder charge, Virginia murder in violation of Va. Code Ann. § 18.2-32, was also a crime of violence. JA-142 n.3.

Mr. Manley filed his notice of appeal on June 1, 2020. JA-144. On April 9, 2021, this Court granted Mr. Manley a certificate of appealability.

SUMMARY OF THE ARGUMENT

Mr. Manley's guilty pleas to § 924(c) and (j) violations in Counts 25 and 35 of his indictment should be vacated because the underlying predicate crimes charged in those counts do not qualify as crimes of violence as defined in § 924(c)(3)(A). Those crimes can be committed with a *mens rea* of recklessness or extreme recklessness, and therefore do not necessarily involve a use of force against the person or property of another.

This Court has held for years that the force clause requires proof of purposeful or knowing conduct, and the Supreme Court's recent decision in *Borden* confirms that position. The Supreme Court held that crimes that can be committed with a merely reckless *mens rea* do not satisfy the statutory language, and both the plurality's reasoning and Justice Thomas's make clear that extreme recklessness also is insufficient. The plurality's central point was that one does not "use" force "against" another unless that force is consciously directed against the victim—which

requires intent or, at a minimum, knowledge that the application of force is "practically certain." 141 S. Ct. at 1823. Justice Thomas explained that in his view the phrase "use of physical force" "'has a well-understood meaning applying only to intentional acts designed to cause harm.'" *Id.* at 1835 (Thomas, J., concurring) (quoting *Voisine v. United States*, 136 S. Ct. 2272, 2279, 2290 (2016) (Thomas, J., dissenting)). Even extreme recklessness falls far short of purposeful conduct or knowledge that harm is a practical certainty. Recklessness is awareness of risk, and the recklessness described as "extreme" can be satisfied by known risks as low as five or ten percent. The Supreme Court's explanation that reckless driving clearly does not satisfy the force clause eliminates any doubt. It is well-established that reckless drivers can be convicted of crimes requiring a *mens rea* of extreme recklessness.

An appropriate investigation of the "generic" elements of VICAR murder and assault with a dangerous weapon reveals that both crimes can be committed with a *mens rea* of recklessness or extreme recklessness. Every federal Circuit that has considered the issue has concluded, correctly, that extreme recklessness is sufficient for generic murder. A fifty-state survey reveals that assault with a dangerous weapon can be committed through extreme recklessness, ordinary recklessness, or negligence in a strong majority of jurisdictions. (That conclusion is the same whether Congress intended to reference generic "assault" plus a dangerous weapon element,

or instead a generic freestanding "assault with a dangerous weapon" offense.) And the Virginia crimes charged as predicates for the VICAR offenses also can be committed with a mens rea of recklessness or extreme recklessness.

The crimes charged in Counts 25 and 35 of Mr. Manley's indictment do not have as a necessary element the use of force against the person or property of another, and therefore do not qualify as § 924(c) crimes of violence after the Supreme Court's recent decisions in *Davis* and *Borden.* Mr. Manley's guilty pleas to those counts should be vacated.

STANDARD OF REVIEW

In an appeal from the denial of a 28 U.S.C. § 2255 motion, this Court "review[s] the district court's legal conclusions de novo." *United States v. Morris*, 917 F.3d 818, 822 (4th Cir. 2019) (citing *United States v. Carthorne*, 878 F.3d 458, 464 (4th Cir. 2017)). Whether a crime qualifies as a "crime of violence" under the categorical approach is essentially a pure question of law. *See United States v. Mathis*, 932 F.3d 242, 263 (4th Cir. 2019); *United States v. Shell*, 789 F.3d 335, 338 (4th Cir. 2015).

ARGUMENT

I. EXTREME RECKLESSNESS DOES NOT INVOLVE A USE OF FORCE AGAINST THE PERSON OR PROPERTY OF ANOTHER

A. This Court Has Held That Use Of Force Against Another Requires Purposeful Or Knowing Conduct

Even prior to *Borden*, this Court held that use of force against the person or property of another requires purposeful or knowing conduct. In *United States v. Middleton*, the defendant was convicted of involuntary manslaughter under South Carolina law—a crime that could be committed by selling alcohol to a minor who subsequently died in a car crash. 883 F.3d 485, 489 (4th Cir. 2018).

This Court held in *Middleton* that the defendant's crime did not satisfy the force clause in the ACCA's definition of a violent felony, which is in relevant part identical to § 924(c)(3)(A). The panel explained that "'[t]he word 'use' conveys the idea that the thing used (here, 'physical force') has been made the user's instrument." *Id.* at 492 (quoting *United States v. Castleman*, 134 S. Ct. 1405, 1415 (2014)). And it concluded that selling alcohol cannot be described as "'employing [alcohol] *knowingly* as a device to cause physical harm,'" in a way that would make physical force the defendant's instrument. *Id.* (quoting *United States v. Reid*, 861 F.3d 523, 528 (4th Cir. 2017)). Since "*reckless* disregard for the safety of others . . . falls short of *knowingly* causing harm," South Carolina involuntary manslaughter did not

necessarily involve a "use" of force. *Id.* at 492-93 (internal quotation marks omitted).[1]

This Court has repeatedly recognized that "[t]he logic of" *Middleton* "extends to those offenses that can be committed innocently, negligently, or recklessly." *United States v. Allred*, 942 F.3d 641, 653 (4th Cir. 2019); *see also id.* at 654 (quoting *United States v. Shepard*, 741 F. App'x 970, 972 (4th Cir. 2018) ("*Middleton* stands for the proposition that *unintentionally* causing physical force to harm someone is not necessarily 'a use of violent physical force against the person of another.'") (emphasis added by *Allred*)); *United States v. Battle*, 927 F.3d 160, 166 (4th Cir. 2019) (ACCA force clause may not be satisfied "where a crime does not have as an element the intentional causation of death or injury.").

Just as with the reckless crime in *Middleton*, a crime that can be committed through "extreme" recklessness "falls short of *knowingly* causing harm" and does

[1] In a concurring opinion in *Middleton*, Judge Floyd questioned the panel's additional reliance on causation principles and a distinction between *de minimis* and "violent" force. But in sections of the concurrence that were joined by Judge Harris and therefore also commanded a panel majority, Judge Floyd explained that the panel's holding nonetheless was correct because the ACCA's force clause "require[s] a higher level of *mens rea* than recklessness." *Id.* at 500 (Floyd, J., concurring in part and in the judgment). Judges Floyd and Harris concluded the issue had already been resolved by this Court's prior cases. *Id.* at 498.

not establish that the defendant has made physical force his "instrument." *Middleton*, 883 F.3d at 492-93.

B. *Borden* Confirms That Use Of Force Against Another Requires Purposeful Or Knowing Conduct

To the extent that this Court's precedents left any doubt, the Supreme Court's reasoning in *Borden* confirms that the force clause requires purposeful or knowing conduct.

The *Borden* plurality opinion began by explaining the traditional hierarchy of culpable mental states in criminal law, with "purpose and knowledge" at the top. 141 S. Ct. at 1823. "A person acts purposefully when he 'consciously desires' a particular result," and "knowingly when 'he is aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Id.* (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)). The plurality explained that "the distinction between the two [i]s 'limited'" and "'has not been considered important' for many crimes," because a person who injures another knowingly, "even though not affirmatively wanting the result, still makes a deliberate choice with full awareness of consequent harm.'" *Id.* (quoting *Bailey*, 444 U.S. at 403-04). Both a purposive and knowing actor "have consciously deployed [force] at another person," just "for different reasons." *Id.* at 1827. For that reason, the law views a knowing offender as intending the harmful result, even if the harmful result was not his

specific *purpose*. *Id.* (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 445 (1978)).

By contrast, "[r]ecklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury." *Id.* at 1824. A reckless violator "'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards." *Id.* (quoting Model Penal Code § 2.02(2)(c)). But he does not in any sense *intend* the harm that may result.

The *Borden* plurality explained that the phrase "use of physical force" in the ACCA indicates a "'volitional' or 'active' employment of force." *Id.* at 1825 (quoting *Voisine*, 136 S. Ct. at 2279-81). And because it modifies "use of force" in that volitional sense, the "against another" phrase "demands that the perpetrator direct his action at, or target, another individual." *Id*. The interaction between the two phrases served, in the plurality's view, to refute the government's suggestion that "against" might just mean unconsciously "'mak[ing] contact with,'" as in "'waves crashing against the shore.'" *Id.* at 1826. Together they demand an "oppositional, or targeted definition" that requires a conscious decision and therefore "covers purposeful and knowing acts, but excludes reckless conduct." *Id.*

Reckless conduct, the plurality explained, is simply "not aimed in [the] prescribed manner." *Id.* at 1825. A driver who runs a red light and hits an unseen

pedestrian is reckless: He "consciously disregarded a real risk." *See id.* at 1827. Still the driver "has not directed force at another." *Id.* He "has not trained his car at the pedestrian understanding he will run him over." *Id.* Because "[the driver's] conduct is not opposed to or directed at another," he does not "use[] force 'against' another person in the targeted way that [the statute] requires." *Id.* The force clause requires "a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1830.

The plurality thought those conclusions were confirmed by the statutory context of the force clause, which defines the category of "violent felon[ies]" under the ACCA. As in prior cases involving definitions of "violent felony" or (as here) "crime of violence," the plurality emphasized that a statutory definition of *violent* crimes served "to mark out a narrow 'category of violent, active crimes'" carrying substantially enhanced punishment. *Id.* (quoting *Johnson v. United States*, 559 U.S. 133, 140 (2010), and citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004)). "[T]hose crimes," the plurality explained, are best understood to involve not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* And extending the use of force clause "to reckless offenses would thus do exactly what *Leocal* decried: 'blur the distinction between the 'violent' crimes Congress sought

to distinguish for heightened punishment and [all] other crimes." *Id.* at 1831 (quoting *Leocal*, 543 U.S. at 11).

Justice Thomas's concurring opinion also concluded that crimes requiring only reckless conduct could not satisfy the force clause. *See id.* at 1835 (Thomas, J., concurring in the judgment). Unlike the plurality, Justice Thomas was comfortable basing that holding solely on the phrase "use of physical force." *Id.* He concluded 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." *Id.* (internal quotation marks omitted). Justice Thomas reiterated his longstanding position, however, that *Johnson* was incorrectly decided and that the ACCA residual clause is not unconstitutionally vague. *Id.*

C. Extreme Recklessness Does Not Satisfy The Force Clause

In *Borden* the plurality explicitly reserved the question, not presented in that case, of whether extreme recklessness or a "depraved heart" mental state would satisfy the ACCA's force clause. *Borden*, 141 S. Ct. at 1825 n.4. But both the plurality's reasoning and Justice Thomas's make clear that the statutory language requires a conscious targeting of force that could only be satisfied by purposeful or knowing conduct, and not by any form of recklessness.

Extreme recklessness has been differentiated from "ordinary" recklessness in a number of ways in different contexts. Extreme recklessness is "more callous, wanton, or reckless" than ordinary recklessness. *United States v. Lesina*, 833 F.2d 156, 159 (9th Cir. 1987). The "quality of awareness of the risk" is different. *Id.* (quoting *United States v. Dixon*, 419 F.2d 288, 292-93 (D.C. Cir. 1969) (Leventhal, C.J., concurring)). Often the known risk must be a danger to human life, rather than some lesser harm. *See, e.g.*, N.Y. Penal Law § 125.25(2) (McKinney). The "probability of death" is higher. *See United States v. Baez-Martinez*, 950 F.3d 119, 126 (1st Cir. 2020), *cert. petition docketed* No. 20-5075 (U.S. July 15, 2020). The risk of serious injury or death may need to be "very high." *United States v. Pineda-Doval*, 614 F.3d 1019, 1038 n.13 (9th Cir. 2010). On some level, the difference comes down to the defendant's "degree of recklessness." *See Steele v. State*, 852 So. 2d 78, 80-81 (Miss. App. 2003).

Despite the word "extreme," extreme recklessness is still recklessness, requiring a risk "far less than . . . substantial certainty." Wayne R. LaFave & Austin W. Scott, 2 *Substantive Criminal Law* § 14.4(a), Westlaw (3d ed. database updated Oct. 2020). And even toleration of a large and dangerous risk is not "a *deliberate* choice with *full awareness* of consequent harm." *Borden*, 141 S. Ct. at 1823. (plurality op.) (emphasis added). As the *Borden* plurality explained, criminal law recognizes knowledge as the equivalent of purposive intent in many situations. But

the sort of knowledge that could constitute a "use of force" "against the person or property" of another requires much more than awareness of risk. The defendant must be "aware that [a] result is practically certain to follow from his conduct." *Id.* (quoting *Bailey*, 444 U.S. at 404).

Like ordinary recklessness, extreme recklessness can be evaluated on a sliding scale: The more unjustified the risk, the lower the risk needs to be. *See* Stephen P. Garvey, *What's Wrong with Involuntary Manslaughter?*, 85 Tex. L. Rev. 333, 345 n.56 (2006). A sixty percent chance has been held more than sufficient. *Commonwealth v. Ashburn*, 331 A.2d 167, 170 (Pa. 1975). One author expects a ten percent chance of harm would be enough. Garvey, 85 Tex. L. Rev. at 345 n.56. A leading treatise suggests five percent as the threshold, while acknowledging that the law does not rely on a precise level of risk. 2 *Substantive Criminal Law* § 14.4(a) n.22.

Such objectively low probabilities are not equivalent to "practical certainty," and are not the practical equivalent of a purpose to cause harm —either linguistically or in terms of the offender's culpability. Even if the risk is "extreme," it is still just a possibility, and one that the defendant may have underestimated. Actors who disregard a risk that their conduct will create harmful force simply cannot be said to "use," "target," or "intend" that application of force in the way that a knowing violator can. *See Borden*, 141 S. Ct. at 1824-27 (plurality op.).

The Ninth Circuit reached that conclusion in a pre-*Borden* case. *See United States v. Begay*, 934 F.3d 1033, 1040 (9th Cir. 2019). In *Begay*, the Ninth Circuit faced a second degree murder statute that could be committed through "extreme" recklessness. *Id.* The Ninth Circuit found the level of recklessness inconsequential. *Id.* It held that its precedent required intentional use of force, and concluded that "[r]eckless murder, no matter how extreme, is not intentional." *Id.*

As the *Borden* plurality explained, we also "'cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Borden*, 141 S. Ct. at 1830 (quoting *Leocal*, 543 U.S. at 11). This statutory definition is meant to police the boundary between all crimes and "a narrow 'category of violent, active crimes.'" *Id.* (quoting *Johnson*, 559 U.S. at 140). Crimes of recklessness, even extreme recklessness, often would not be understood as *crimes of violence*, in ordinary parlance.

The *Borden* plurality held up a number of cases as examples of conduct that do not fit the common understanding of violent felonies—most prominently reckless driving, but also jumping from a mall balcony and skiing at dangerously fast speeds. *See id.* at 1831. Similar conduct has been held sufficient for conviction of crimes that require "extreme" recklessness. Carelessly throwing a piece of lumber into a street would be sufficient in Virginia courts to support a murder conviction. *See Mosby v. Commonwealth*, 190 S.E. 152, 154 (Va. 1937); *Whiteford v.*

Commonwealth, 27 Va. 721, 724–25 (Va. Gen. Ct. 1828). Instructing an undocumented alien to hide in a truck compartment and failing to tell Border Patrol agents of his hiding place is sufficient to support a federal conviction for second degree murder. *United States v. Escobedo-Moreno*, 781 F. Appx. 312, 314, 318 (5th Cir. 2019). Failing to properly train and control aggressive dogs, so that the defendant "could have reasonably foreseen" that they could injure someone, is sufficient to support a murder conviction in Kansas. *State v. Davidson*, 987 P.2d 335 (Kan. 1999).

And of course reckless or drunk driving are the paradigmatic examples of reckless conduct that "do[es] not fit within the ordinary meaning of the term violent crime" and would not satisfy the force clause according to the *Borden* plurality. 141 S. Ct. at 1830-31 (plurality op.) (internal quotation marks omitted). It is well established that reckless and intoxicated driving can count as extremely reckless behavior. *See Knight v. Commonwealth*, 733 S.E.2d 701, 708-09 (Va. Ct. App. 2012) (driver who drove a car at a high speed into a turn lane); *United States v. Lemus-Gonzalez*, 563 F.3d 88, 93 (5th Cir. 2009) (intoxicated driver who transported aliens without seatbelts at a high rate of speed); *State v. Barstad*, 970 P.2d 324, 326 (Wash. Ct. App. 1999) (intoxicated driver who sped through red light at busy intersection), *review denied*, 137 Wash. 2d 1037, 980 P.2d 1284 (1999); *State v. Braden*, 867 S.W.2d 750, 753 (Tenn. Crim. App. 1993) (intoxicated driver who took a blind curve

at over eighty miles per hour); *Allen v. State*, 611 So.2d 1188, 1189-90 (Ala. Crim. App. 1992) (intoxicated driver who swerved into oncoming traffic); *State v. Woodall*, 744 P.2d 732, 736 (Ariz. Ct. App. 1987) (intoxicated driver who crossed the center line while speeding); *Pears v. State,* 672 P.2d 903, 909 (Alaska App. 1983) (intoxicated driver who ran stop signs, yield signs, and traffic lights), *remanded on other grounds*, 698 P.2d 1198 (Alaska 1985).

An interpretation of § 924(c)(3)(A) that would sweep in these "extremely reckless" violators would have results even more harsh than those that the *Borden* plurality considered implausibly "severe" under the ACCA. *Borden,* 141 S. Ct. at 1822. Under the ACCA, an offender who commits three violent felonies and then possesses firearms suffers an "increase in penalty" from a ten-year to a fifteen-year maximum. *Id.* Under § 924(c), an offender who possesses a firearm "during and in relation to any crime of violence or drug trafficking crime," is similarly sentenced to an extra five years. *See* § 924(c)(1)(A)(i). But when the offender has *one* prior conviction (not two or three) the offender must be sentenced to at least twenty-five years in prison. *See* § 924(c)(1)(C)(i). The severity of those penalties supports Congress's intent to limit the definition of "crime[s] of violence" to "purposeful, violent, and aggressive" crimes. *Borden*, 141 S. Ct. at 1830 (plurality op.) (citation omitted).

The government may cite the First Circuit's pre-*Borden* decision in *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020), and appeal to "common sense," arguing that it would be absurd to hold that murder is not a crime of violence. *See In re Irby*, 858 F.3d 231, 237 (4th Cir. 2017) ("Common sense dictates that murder is categorically a crime of violence under the force clause."). Of course murder is usually a purposeful and violent crime. But Justice Thomas and the *Borden* plurality were fully aware that their holding might leave some forms of murder outside the scope of the force clause, because that point was urged forcefully by the dissent. *See Borden*, 141 S. Ct. at 1856 (Kavanaugh, J., dissenting). The dissent even observed that the plurality's silence on depraved-heart murder was "telling," and "show[ed] just how far the plurality's interpretation of this statute has strayed from the statutory text and basic common sense." *Id.* at 1856 n.21.

This Court has recognized that sometimes the categorical approach will exclude crimes of appalling depravity. *See United States v. Shell*, 789 F.3d 335, 346 (4th Cir. 2015), *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). In *United States v. Shell*, this Court had to decide if North Carolina second-degree rape was a crime of violence, given that it could be committed consensually with a victim legally unable to give consent. *See id.* at 339. But while emphasizing that "[o]ur decision should not be understood to minimize in any way the seriousness of the offenses . . . or the importance of the state's interest in

protecting the most vulnerable of victims," this Court found the rape offense was not a crime of violence. *Id.* at 346.

The result in *Shell* illustrates a principle that by now is well-established. Sometimes cases applying the force clause and similar statutes will arrive at "unsatisfying and counterintuitive" outcomes—"[b]ut that's the categorical approach for you." *United States v. Mayo*, 901 F.3d 218, 230 (3d Cir. 2018). Justice Thomas wrote separately in *Borden* primarily to urge that *Johnson* should be revisited—precisely because a fair application of the categorical approach to the force clause produces such counterintuitive results.

II. THE VICAR PREDICATE OFFENSES CAN BE COMMITTED WITH A *MENS REA* OF EXTREME OR ORDINARY RECKLESSNESS

This Court held in *United States v. Keene* that the VICAR statute requires proof of conduct that violates an enumerated federal offense and is also "in violation of the laws of any State or the United States." 955 F.3d 391, 392 (4th Cir. 2020) (quoting 18 U.S.C. § 1959). Counts 25 and 35 of Mr. Manley's indictment charge the federal VICAR predicates of murder and assault with a dangerous weapon, in violation of certain Virginia statutes. We will begin by analyzing the VICAR predicates, and address the Virginia statutes in Section III, *infra*.

A. VICAR Murder Can Be Committed With Extreme Recklessness

Count 35 of Mr. Manley's indictment charged him with using and discharging a firearm in relation to a crime of violence resulting in death. JA-74. The "crime of violence" was "Murder in Aid of Racketeering Activity in violation of Title 18, United States Code, Section 1959(a)(1)." *Id.* That statute provides no particular definition of murder, and therefore must be understood as incorporating the generic definition of the crime. In uncovering the "ordinary, contemporary, common meaning" of an undefined crime, courts look to the crime's generic definition. *See Perrin v. United States*, 444 U.S. 37, 42, 49 (1979). A crime's generic definition is what the term means as it is used "in the criminal codes of most States." *Taylor*, 495 U.S. at 598. Other circuits have recognized that VICAR predicate crimes are defined generically. *See United States v. Kehoe*, 310 F.3d 579, 588 (8th Cir. 2002); *United States v. Tolliver*, 61 F.3d 1189, 1208-09 (5th Cir. 1995), *vacated on other grounds*, 519 U.S. 802 (1996); *United States v. Orena*, 32 F.3d 704, 714 (2d Cir. 1994); *United States v. Joseph*, 465 F. App'x 690, 696 (9th Cir. 2012).

Looking to generic definitions in interpreting VICAR would fit the Supreme Court's treatment of VICAR's companion statute. The Racketeering Influenced and Corrupt Organizations Act (RICO) enumerates a similar string of crimes to define "racketeering activity": "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed

chemical" punishable under state law. 18 U.S.C. § 1961(1). The Supreme Court has held that RICO extortion has a generic meaning. *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003).

Other similar legislation has been interpreted the same way. The Career Criminals Amendment Act of 1986 received this treatment. *See Taylor*, 495 U.S. at 577, 598. The Act referred to crimes that were "burglary, arson, or extortion." 18 U.S.C. § 924(e)(2)(B)(ii). The Supreme Court held that burglary, as used in the statute, had a generic definition. *Taylor*, 495 U.S. at 598. The Travel Act refers to "extortion, bribery, or arson." *United States v. Nardello*, 393 U.S. 286, 287 n.1 (1969). The Supreme Court interpreted the Act to include "acts [that] fall within the generic term extortion," as opposed to the understanding of the term seen in a particular state's laws or in the common law. *Id.* at 290, 296. The term "bribery" was also given a generic meaning. *Perrin*, 444 U.S. at 49. Like these statutes, the VICAR statute lists a string of undefined crimes. *See* 18 U.S.C. § 1959(a). It should receive the same treatment.

Legislative history also supports consulting the generic definitions of terms in the VICAR statute. VICAR offenses were "intended to apply to [the enumerated] crimes in a generic sense." 128 Cong. Rec. 26486 (97th Cong., 2d. Sess., Sept. 30, 1982); *see also* 129 Cong. Rec. 22906 (98th Cong., 1st Sess., Aug 4, 1983) (same).

This clear language gives "no indication that Congress intended to . . . limit [the term's] meaning" to the common law usage. *See Perrin*, 444 U.S. at 45.

The generic definition of a crime "roughly correspond[s] to the definitions of [the crime] in a majority of the States' criminal codes." *Taylor v. United States*, 495 U.S. at 589. Where state laws yield a consensus, they establish the generic definition. *See United States v. McCollum*, 885 F.3d 300, 307-08 (4th Cir. 2018). Although there is no hard and fast rule, this Court has held that the agreement of more than thirty-two states is sufficient proof of consensus. *Id.* at 308.

Despite the importance of a jurisdictional survey, this Court also gives weight to the Model Penal Code. *See United States v. Peterson*, 629 F.3d 432, 436 (4th Cir. 2011). Other sources worthy of attention include *Black's Law Dictionary* and criminal law treatises. *See Taylor*, 495 U.S. at 598 (citing Wayne R. LaFave & Austin W. Scott, *Substantive Criminal Law* (1st ed. 1986) n.3, § 8.13, pp. 466, 471, 474; *United States v. Gomez-Mendez*, 486 F.3d 599, 603 n.7 (9th Cir. 2007) (citing *Black's Law Dictionary* 1288 (8th ed. 2004)).

In 2014, the Third Circuit surveyed all fifty states and found that "[a]t least thirty define a form of unintentional murder involving a substantial likelihood of death, indifference (often "extreme indifference") to the value of human life, an abandoned, malignant, or depraved heart, express or implied malice, or recklessness." *United States v. Marrero*, 743 F.3d 389, 400 n.4 (3d Cir. 2014), *cert.*

denied 574 U.S. 1081, *abrogated on other grounds by Johnson v. United States*, 576 U.S. 591 (2015). Similarly, the Model Penal Code allowed for murder committed recklessly and "under circumstances manifesting extreme indifference to the value of human life." *Id.* at 400 (quoting Model Penal Code § 210.2). *Black's Law Dictionary* defined "[d]epraved-heart murder" as "a murder resulting from an act so reckless and careless of the safety of others that it demonstrates the perpetrator's complete lack of regard for human life." *Id.* at 400 (quoting *Black's Law Dictionary* at 1114 (9th ed. 2009)).

Given that consensus, the Third Circuit correctly held that the generic definition of murder includes death caused by "conduct evincing reckless and depraved indifference to serious dangers posed to human life." *Id.* at 401. Other Courts of Appeals have since followed *Marrero*'s lead. *See United States v. Castro-Gomez*, 792 F.3d 1216, 1216-17 (10th Cir. 2015); *United States v. Hopskin*, 702 F. App'x 335, 337 (6th Cir. 2017); *United States v. Vederoff*, 914 F.3d 1238, 1246-47 (9th Cir. 2019); *Baez-Martinez*, 950 F.3d at 125, 128.

Finally, although the generic definition is most appropriate, common law murder can also be committed recklessly. Under the common law, murder is defined by malice. *See Stevenson v. United States*, 162 U.S. 313, 320 (1896). But common law malice evolved to include a "depraved heart," which the Fifth Circuit has described as a "term of art that refers to a level of extreme recklessness and wanton

disregard for human life." *United States v. Browner*, 889 F.2d 549, 551-52 (5th Cir. 1989). So common law murder also embraces extreme recklessness.

B. VICAR Assault With A Dangerous Weapon Can Be Committed With A *Mens Rea* Of Recklessness

The generic crime referenced as "Assault with a Dangerous Weapon" in 18 U.S.C. § 1959(a)(3), and charged as the predicate for the § 924(c)(1) charge in Count 25 of Mr. Manley's indictment, requires only a showing of ordinary recklessness.

It is especially important to look to a generic definition, rather than any particular common law definition, when considering assault crimes. The Supreme Court has instructed that generic definitions are important when statutes have "extended the term . . . well beyond its common-law meaning." *Perrin*, 444 U.S. at 43. Just as the contemporary meaning of "burglary" had diverged substantially from the common law meaning in *Taylor*, *see* 495 U.S. at 592-94, the contemporary meaning of the term "assault" has departed significantly from the common law as its meaning has grown to include traditional battery, *see United States v. Hampton*, 628 F.3d 654, 660 (4th Cir. 2010).

Congress's reference to a defendant who "assaults with a dangerous weapon" in aid of racketeering might be understood as incorporating the generic definition of "assault," plus a dangerous-weapon element. Or it might be understood as invoking the generic definition of a freestanding "assault with a dangerous weapon" offense. Given the great diversity in how states categorize their assault crimes, the former

makes more sense. But either analysis leads to the same result: A strong majority of jurisdictions recognize that an assault committed with a dangerous weapon requires a *mens rea* no greater than recklessness.

In a large majority of jurisdictions assault can be committed with a *mens rea* of recklessness or negligence. In twenty-six states the reckless or negligent *mens rea* is clear on the face of the statute.[2] The statutes in eight other states are not so explicit, but precedent clarifies that assault can be committed recklessly or negligently.[3] Indiana does not define an assault crime.

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[2] *See* Ala. Code § 13A-6-22; Alaska Stat. Ann. § 11.41.230 (West); Ariz. Rev. Stat. Ann. § 13-1203; Ark. Code Ann. § 5-13-206 (West); Colo. Rev. Stat. Ann. § 18-3-204 (West); Conn. Gen. Stat. Ann. § 53a-61 (West); Del. Code Ann. tit. 11, § 611; Haw. Rev. Stat. Ann. § 707-712 (West); Ky. Rev. Stat. Ann. § 508.030 (West); Me. Rev. Stat. tit. 17-A, § 207; Miss. Code. Ann. § 97-3-7 (West); Mo. Ann. Stat. § 565.056 (West); Mont. Code Ann. § 45-5-201 (West); Neb. Rev. Stat. Ann. § 28-310; N.H. Rev. Stat. Ann. § 631:2-a; N.J. Stat. Ann. § 2C:12-1 (West); N.Y. Penal Law § 120.00 (McKinney); N.D. Cent. Code Ann. § 12.1-17-01 (West); Ohio Rev. Code Ann. § 2903.13 (West); Or. Rev. Stat. Ann. § 163.160 (West); 18 Pa. Stat. and Cons. Stat. Ann. § 2701; S.D. Codified Laws § 22-18-1; Tenn. Code Ann. § 39-13-101 (West); Tex. Penal Code Ann. § 22.01 (West); Vt. Stat. Ann. tit. 13, § 1023(a) (West); Wash. Rev. Code Ann. § 9A.36.031 (West).

[3] *See* D.C. Code Ann. § 22-404 (West) (criminalizing assault without defining it); *Vines v. United States*, 70 A.3d 1170, 1179-80 (D.C. 2013) (noting that District of Colombia simple assault is a general intent crime and that "our case law . . . permits a finder of fact to infer the general intent to commit a crime from reckless conduct"); *United States v. Schneider*, 905 F.3d 1088, 1096 n.7 (8th Cir. 2018) (classifying District of Colombia simple assault as requiring ordinary recklessness); Md. Code Ann., Crim. Law § 3-201(b) (West) (defining Maryland assault to include common law battery); *Lamb v. State*, 613 A.2d 402, 455 (Md. Ct. Spec. App. 1992) (explaining that Maryland battery can be committed negligently); Mass. Gen. Laws Ann. ch. 265, § 13A (West) (punishing assault and battery without defining assault); *Commonwealth v. Welch*, 450 N.E.2d 1100, 1102

That leaves only sixteen statutes that appear to require intent to use force.[4] And the courts in a number of those states have explained that the required intent is

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(Mass. App. Ct. 1983) (explaining that for purposes of Massachusetts assault and battery a "wilful, wanton and reckless act which results in personal injury to another" can substitute for intentional conduct); N.C. Gen. Stat. Ann. § 14-33 (punishing assault without defining it); *State v. Hines*, 600 S.E.2d 891, 896 n.1 (N.C. Ct. App. 2004) (noting that the intent for an assault offense may be implied from criminal negligence); Okla. Stat. Ann. tit. 21, § 641 (West) (defining assault as "any willful and unlawful attempt or offer with force or violence to do a corporal hurt to another"); *In re Adoption of the 2007 Revisions to the Oklahoma Unif. Jury Instructions*, 163 P.3d 567, 573 (Okla. Crim. App. 2007) (mem. opinion) (explaining in the context of Oklahoma assault with a dangerous weapon that accident excludes intent "so long as the accident . . . occurred while the defendant was acting in a lawful manner, with reasonable regard for the safety of others" and that culpable negligence in operating an automobile "suffices to substitute for and to supply the requisite intent to do bodily harm"); *United States v. Hemingway*, 734 F.3d 323, 335 (4th Cir. 2013) (recognizing that South Carolina common law assault and battery of a high and aggravated nature does not satisfy the ACCA's Force Clause, and noting that the crime has since been codified); S.C. Code Ann. § 16-3-600 (adding no specific intent requirement and making clear that first, second, and third degree assault and battery are lesser included offenses of assault and battery of a high and aggravated nature); Utah Code Ann. § 76-5-102 (West) (defining assault to include "an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another"); *State v. Gallegos*, 427 P.3d 578, 583 (Utah Ct. App. 2018) (reasoning that "[b]ecause the [Utah] statute governing assault does not include a prescribed mental state, the mental state applied to assault is intent, knowledge, or recklessness" (internal citation and quotation marks omitted)); Va. Code Ann. 18.2-57 (West) (punishing "simple assault or assault and battery" without defining terms); *Davis v. Commonwealth*, 143 S.E. 641, 643 (Va. 1928) (stating that in Virginia "reckless and wanton disregard for the lives and safety of other people" was sufficient for the imputation of the intent necessary for an assault and battery conviction); *Banovitch v. Commonwealth*, 83 S.E.2d 369, 375 (Va. 1954) (noting that in Virginia if a physician causes injury with a criminally negligent state of mind, the physician commits assault and battery).

[4] *See* Cal. Penal Code § 240 (West); Fla. Stat. Ann. § 784.011 (West); Ga. Code Ann. § 16-5-20 (West); Idaho Code Ann. § 18-901 (West); 720 Ill. Comp. Stat.

only "general" intent, a term that is often interpreted to be consistent with recklessness. Indeed, at least five of those states have case law holding explicitly that the "intent" required for assault can be satisfied by a state of mind no more culpable than recklessness.[5] Another three appear ambiguous.[6] So at most eleven

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Ann. 5/12-1; Iowa Code Ann. § 708.1; Kan. Stat. Ann. § 21-5412(a); La. Stat. Ann. § 14:36; Mich. Comp. Laws Ann. § 750.81; Minn. Stat. Ann. § 609.224; Nev. Rev. Stat. Ann. § 200.471(1)(a); N.M. Stat. Ann. § 30-3-1 (West); 11 R.I. Gen. Laws Ann. § 11-5-3; W. Va. Code Ann. § 61-2-9(b); Wis. Stat. Ann. § 940.19; Wyo. Stat. Ann. § 6-2-501.

[5] *See People v. Williams*, 29 P.3d 197, 203 (Cal. 2001) (noting concerning California assault that a defendant "need not be subjectively aware of the risk that a battery might occur"); *Kelly v. State*, 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) (explaining that the intent required for Florida aggravated assault "may be supplied by proof of conduct equivalent to culpable negligence"); *Dunagan v. State*, 502 S.E.2d 726, 730 (Ga. 1998) (stating that for Georgia assault "an intent of the accused that must be shown, but it is only the criminal intent to commit the acts which caused the victim to be reasonably apprehensive of receiving a violent injury, not any underlying intent of the accused in assaulting the victim"), overruled on other grounds, *Parker v. State*, 507 S.E.2d 744 (Ga. 1998); *People v. Litch*, 281 N.E.2d 745, 790 (Ill. App. Ct. 1972) (stating that "[n]o mental state is required to be proven in the case of a simple assault" in Illinois); *Louisiana v. Julien*, 34 So.3d 494, 499 (La. Ct. App. 2010) (stating that the negligent discharge of a gun was enough to support conviction for aggravated assault with a firearm in Louisiana); *United States v. Young*, 809 F. App'x 203, 209 (5th Cir. 2020) (finding that Louisiana aggravated assault with a firearm was not a violent felony because it could be accomplished with negligent conduct).

[6] *See* Iowa Code Ann. § 708.1 (stating that assault is a general intent crime); *People v. Johnson*, 202 N.W.2d 340, 342 (Mich. Ct App. 1972) (finding that Michigan felonious assault is not a specific intent crime); *State v. Manus*, 597 P.2d 280, 284 (N.M. 1979) (holding in the context of New Mexico aggravated assault that the State must only prove the doing of an unlawful act, not an intentional assault), *overruled on other grounds by Sells v. State*, 653 P.2d 162 (N.M. 1982);

states, and perhaps as few as eight states, actually require proof of intent to use force against the person or property of another.

Secondary sources are consistent with that jurisdictional consensus.[7] And a requirement that an assault be committed "with a dangerous weapon" does not imply a heightened *mens rea*. As discussed below, many states recognize that an assault can be committed *with a dangerous weapon* recklessly or negligently. For example, a vehicle can be a dangerous weapon, if driven recklessly.[8]

Identifying the elements of a generic "assault with a dangerous weapon" offense is somewhat more complex, because of the great diversity in how states categorize their assault crimes and the fact that many define multiple gradations of assaults involving dangerous weapons. Of the states that specifically require a

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[7] The Model Penal Code defines assault to include the reckless causation of bodily injury. § 211.1(1). And two prominent criminal law treatises agree that battery can be committed with a mens rea of criminal negligence in most jurisdictions. Charles E. Torcia, *Wharton's Criminal Law* § 178, Westlaw (15th ed. database updated Aug. 2020); 2 *Substantive Criminal Law* § 16.2(c)(2). They do maintain the common-law understanding of assault as attempted battery. Torcia, *Wharton's Criminal Law* § 179; LaFave, 2 *Substantive Criminal Law* § 16.2(c). However, LaFave and Scott recognize that many states define assault "to include what is usually classified as battery." § 16.1 n.3. Similarly, *Black's Law Dictionary* clarifies that one sense of criminal "assault" is the modern sense of causing injury "intentionally, knowingly, recklessly, or with criminal negligence." *Black's Law Dictionary* (11th ed. 2019).

[8] *See, e.g., Manning v. State*, 471 So. 2d 1265, 1266-67 (Ala. Crim. App. 1985); *State v. Waskey*, 834 P.2d 1251, 1252-53 (Alaska Ct. App. 1992); *Harmon v. State*, 543 S.W.2d 43, 46 (Ark. 1976) (en banc); *People v. Lucero*, 985 P.2d 87, 92 (Colo. App. 1999); *State v. Lafoe*, 953 P.2d 681, 682-84 (Kan. Ct. App. 1997).

dangerous weapon element in defining a version of assault, again a clear majority of states have at least one version of assault with a dangerous weapon that can be committed recklessly or negligently. For twenty-four states, the statute explicitly states the *mens rea*.[9] For twelve other states, precedent establishes the reckless or negligent mens rea.[10] Six states (Arkansas, Indiana, Maryland, Virginia, West

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[9] *See* Ala. Code § 13A-6-21(a)(3); Alaska Stat. Ann. § 11.41.200 (West); Ariz. Rev. Stat. Ann. §§ 13-1203, 13-1204(A)(2); Colo. Rev. Stat. Ann. § 18-3-203(1)(d) (West); Conn. Gen. Stat. Ann. § 53a-60(a)(3) (West); Del. Code Ann. tit. 11, § 612(a)(2) (West); Haw. Rev. Stat. Ann. § 707-712 (West); Ky. Rev. Stat. Ann. § 508.025(1)(a) (West); Me. Rev. Stat. tit. 17-A, § 208(1)(B); Miss. Code. Ann. § 97-3-7(1)(a) (West); Mont. Code Ann. § 45-5-201(1)(b) (West); Neb. Rev. Stat. Ann. § 28-309(1)(b) (West); N.H. Rev. Stat. Ann. § 631:2(I)(b); N.J. Stat. Ann. § 2C:12-1(b)(3) (West); N.Y. Penal Law § 120.00(3) (McKinney); N.D. Cent. Code Ann. § 12.1-17-01(1)(b) (West); Ohio Rev. Code Ann. § 2903.14 (West); Or. Rev. Stat. Ann. § 163.165(1)(a) (West); 18 Pa. Stat. and Cons. Stat. Ann. § 2701(a)(2) (West); 11 R.I. Gen. Laws Ann. §§ 11-5-2(a), 11-5-2.2 (West); S.D. Codified Laws § 22-18-1(3); Tenn. Code Ann. § 39-13-102(a)(1)(B)(iii) (West); Vt. Stat. Ann. tit. 13, § 1023(a)(2) (West); Wash. Rev. Code Ann. § 9A.36.031(1)(d) (West).

[10] *See* Cal. Penal Code § 245 (West) (using the term "assault" without defining a *mens rea*); *People v. Williams*, 29 P.3d 197, 203 (Cal. 2001) (noting concerning California assault that a defendant "need not be subjectively aware of the risk that a battery might occur"); D.C. Code Ann. § 22-402 (West) (using the term "assault" without defining a *mens rea*); *Vines v. United States*, 70 A.3d 1170, 1179-80 (D.C. 2013) (noting that District of Colombia simple assault is a general intent crime and "our case law . . . permits a finder of fact to infer the general intent to commit a crime from reckless conduct"); Fla. Stat. Ann. § 784.021 (West) (punishing "aggravated assault" without defining a *mens rea*); *Kelly v. State*, 552 So.2d 206, 208 (Fla. Dist. Ct. App. 1989) (explaining that the intent required for aggravated assault "may be supplied by proof of conduct equivalent to culpable negligence"); Ga. Code Ann. § 16-5-21(a)(2) (West) (punishing aggravated assault without defining a *mens rea*); *Dunagan v. State*, 502 S.E.2d 726, 730 (Ga. 1998) (stating in the context of aggravated assault with a deadly weapon that "an intent of the accused that must be shown, but it is only the criminal intent to commit the acts

which caused the victim to be reasonably apprehensive of receiving a violent injury, not any underlying intent of the accused in assaulting the victim"), overruled on other grounds by *Parker v. State*, 507 S.E.2d 744 (Ga. 1998); 720 Ill. Comp. Stat. Ann. 5/12-2(c)(1) (using the term "assault" without defining a *mens rea*); *People v. Litch*, 281 N.E.2d 745, 790 (Ill. App. Ct. 1972) (stating that in Illinois "[n]o mental state is required to be proven in the case of a simple assault"); La. Stat. Ann. § 14:37 (punishing aggravated assault without defining a *mens rea*); *Louisiana v. Julien*, 34 So.3d 494, 499 (La. Ct. App. 2010) (stating that the negligent discharge of a gun was enough to support conviction for the similar crime of aggravated assault with a firearm); *United States v. Young*, 809 F. App'x 203, 209 (5th Cir. 2020) (finding that Louisiana aggravated assault with a firearm was not a violent felony because it could be accomplished with negligent conduct); Mass. Gen. Laws Ann. ch. 265, § 15A(b) (West) (punishing "assault and battery upon another by means of a dangerous weapon" without defining a *mens rea*); *Commonwealth v. Welch*, 450 N.E.2d 1100, 1102 (Mass. App. Ct. 1983) (explaining, in the context of a conviction for assault and battery by means of a dangerous weapon that a "wilful, wanton and reckless act which results in personal injury to another" can substitute for intentional conduct); N.C. Gen. Stat. Ann. § 14-32(b); *State v. Hines*, 600 S.E.2d 891, 896 n.1 (N.C. Ct. App. 2004) (noting that the intent for an assault offense may be implied from criminal negligence); *United States v. Simmons*, 917 F.3d 312, 320 (4th Cir. 2019), as amended (Mar. 6, 2019) (finding that North Carolina assault with a deadly weapon upon a government official is not a crime of violence under U.S.C.G. § 4B1.2 because "it is plausible that North Carolina would punish culpably negligent conduct" under the statute); Okla. Stat. Ann. tit. 21, § 645 (West); *In re Adoption of the 2007 Revisions to the Oklahoma Unif. Jury Instructions*, 163 P.3d 567, 573 (Okla. Crim. App. 2007) (memorandum opinion) (observing in the context of assault and battery with a dangerous weapon that "culpable or wanton negligence" in driving can substitute for the required intent to do bodily harm); *United States v. Hemingway*, 734 F.3d 323, 335 (4th Cir. 2013) (recognizing that South Carolina common law assault and battery of a high and aggravated nature does not satisfy the ACCA's Force Clause, and noting that the crime has since been codified); S.C. Code Ann. § 16-3-600 (adding no specific intent requirement and defining higher-level crimes by their utilization of "means likely to produce death or great bodily injury"); Tex. Penal Code Ann. § 22.02(a)(2) (West) (punishing aggravated assault without defining a *mens rea*); Utah Code Ann. § 76-5-103(1)(b)(i) (West) (punishing aggravated assault with the use of a dangerous weapon without defining a *mens rea*); *State in Interest of McElhaney*, 579 P.2d 328, 329 (Utah 1978) (stating that "under 76-5-103(1)(b) no culpable mental state is specified and thus . . . intent, knowledge, or

Virginia, and Wisconsin) do not have an assault with a dangerous weapon statute. That only leaves nine states, and three of them have general intent offenses.[11] Therefore, between thirty-six and thirty-nine states have an assault with a dangerous weapon offense that can be committed recklessly or negligently, out of the forty-five states that recognize assault with a dangerous weapon as a distinct crime.

However one approaches the problem, the statutes and case law reveal a consensus similar to other cases in the Supreme Court and this Court that have identified the generic definitions of crimes. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570-71 (2017) (thirty-one states, the District of Columbia, and the federal government); *United States v. McCollum*, 885 F.3d 300, 308 (4th Cir. 2018) (thirty-six states, the District of Columbia, three territories, and the federal government); *United States v. Rangel-Castaneda*, 709 F.3d 373, 377 (4th Cir. 2013) (thirty-two states, the District of Columbia, and the federal government). That consensus demonstrates that generic assault with a dangerous weapon requires a *mens rea* no greater than ordinary recklessness.

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recklessness shall suffice to establish criminal responsibility" (internal quotation marks omitted)).

[11] *See* Iowa Code Ann. § 708.1 (stating that assault is a general intent crime); § 708.2 (heightening the offense for "[a] person who commits an assault, as defined in section 708.1, and uses or displays a dangerous weapon in connection with the assault"); *People v. Johnson*, 202 N.W.2d 340, 342 (Mich. Ct App. 1972) (finding that Michigan felonious assault is not a specific intent crime); *State v. Branch*, 417 P.3d 1141, 1149 (N.M. Ct. App. 2018) (concluding that only general criminal intent is required for a conviction of aggravated assault with a deadly weapon).

III. THE STATE VICAR PREDICATES ALSO CAN BE COMMITTED WITH RECKLESSNESS OR EXTREME RECKLESSNESS

Counts 25 and 35 of Mr. Manley's indictments incorporate by reference the allegations of Counts 24 and 34, which allege the actual VICAR offenses that form the predicates for the 924(c) charges that he did plead guilty to in Counts 25 and 35. Count 24 alleges, as the predicate for a VICAR assault with a dangerous weapon charge, that Mr. Manley committed certain conduct "in violation of Va. Code Ann. 18.2-51." JA-58-59. And Count 34 alleges, as the predicate for a VICAR murder charge, that Mr. Manley "unlawfully cause[d] the murder of Tony Vaughn in violation of Va. Code Ann. 18.2-32." JA-72-73.

It is not clear that Mr. Manley pled guilty to these underlying state crimes, since they are not mentioned in Counts 25 or 35, JA-60, 74, in Mr. Manley's plea agreement and statement of facts, JA-84, 95, or in the district court's order accepting his plea, JA-102. But if he did, Virginia case law indicates that they too can be committed recklessly. If there is a "realistic probability" that the statute would be applied to sweep in non-qualifying conduct, the statute is not a predicate violent crime under 18 U.S.C. § 924(c). *See Bryant*, 949 F.3d at 173 (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)). "One plausible example" is enough. *See United States v. Simmons*, 917 F.3d 312, 320 (4th Cir. 2019). Multiple past defendants have been convicted of violating Va. Code Ann. §§ 18.2-51 and -32 for conduct that only recklessly resulted in injury.

A. Extreme Recklessness Is Sufficient To Violate Va. Code § 18.2-32

Virginia second degree murder in violation of Va. Code Ann. § 18.2-32 can be committed with a mens rea of extreme recklessness.[12] As far back as 1828 a Virginia court explained that a conviction for second degree murder would be appropriate "[i]f a workman throws a stone or a piece of timber from a house, in a populous city, into the street, where he knows people are passing, and gives them no warning, and kills a man . . . from criminal carelessness." *Whiteford v. Commonwealth*, 27 Va. 721, 724–25 (Va. Gen. Ct. 1828).

More recent cases have reiterated that reckless conduct can support a second degree murder conviction, although in less colorful language. The Supreme Court of Virginia has stated that "conduct likely to cause death or great bodily harm, wilfully [sic] or purposefully undertaken" could support a conviction of second degree murder. *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984). The key is "an element of viciousness—an extreme indifference to the value of human life." *Id.* at 222 (quoting *Blackwell v. State*, 369 A.2d 153, 158 (Md. Ct. App. 1977)) (emphasis deleted).

Two cases illustrate the level of recklessness required. One involved a mother who inadvertently killed her child. *See Pugh v. Commonwealth*, 292 S.E.2d 339 (Va.

[12] Second degree murder is the appropriate division of the statute to examine. First degree murder requires malice. *See* Va. Code Ann. § 18.2-32. Counts 34 and 35 of Mr. Manley's indictment never mention malice.

1982). The mother, who had a seventh-grade education and lived in poverty, poured pepper in her three-year-old child's mouth, hoping to deter the child from fussing. *Id.* at 340. The pepper blocked the child's windpipe and bronchial tubes, killing her. *Id.* at 340-41. The mother was "very upset" and crying when the first-aid team arrived. *Id.* at 340. She stated, "I didn't mean to kill her." *Id.* Still, the Supreme Court of Virginia upheld a conviction for second degree murder. *Id.* at 342.

The second case involved a spring gun, set to guard a shop, which killed a policeman. *Pierce v. Commonwealth*, 115 S.E. 686, 687 (Va. 1923). The defendant knew the police regularly tested his door, but he did not tell them of the spring gun. *Id.* at 691. Normally the defendant locked the shop's door, but he failed to do so on the fatal night. *Id.* at 687. When a policeman kicked the door, it opened and set off the gun. *Id.* The jury convicted the defendant of second degree murder. *Id.*at 687. Although it vacated the conviction on other grounds, *id.* at 692, the Supreme Court of Appeals concluded that the jury was justified in finding the failure to inform the police "indicate[d] a reckless indifference to the lives of others and a heart regardless of social duty," *id.* at 691.

Commentators have also recognized that depraved heart murder is a form of second degree murder in Virginia, and that it "involves a mental state of extreme recklessness." Ronald J. Bacigal & Corinna Barrett Lain, 7 *Virginia Practice Series* 352 (2020-2021 ed. 2020) (entry for "homicide"). Indeed, as demonstrated *supra* a

majority of jurisdictions nationwide continue to recognize some form of depraved heart murder. It is unremarkable that Virginia follows the majority and retains that common law crime, given that Virginia has remained loyal to the common law in other respects. *See, e.g.,* Carissa Byrne Hessick, *The Myth of Common Law Crimes*, 105 Va. L. Rev. 965, 980-82 (2019) (listing Virginia as one of fifteen jurisdictions that recognize common law crimes).

B. Extreme Recklessness Is Sufficient To Violate Va. Code § 18.2-51

The text of Va. Code Ann. § 18.2-51 is divisible into malicious and unlawful wounding, which are distinguished by the presence or absence of malice. *See, e.g.*, *Williams v. Commonwealth*, 767 S.E.2d 252, 256 (Va. Ct. App. 2015). Mr. Manley's indictment never mentions malice, so his guilty plea could only have encompassed unlawful wounding. *See* JA-58-60. Since both crimes can be committed recklessly, however, the distinction has little significance.

The Virginia Court of Appeals has upheld at least three convictions for malicious or unlawful wounding that were premised on reckless or negligent behavior. In *David v. Commonwealth*, the defendant intentionally fired a gun at the cement near where other people were standing. 340 S.E.2d 576, 577 (Va. Ct. App. 1986). The bullet "ricocheted" and hit the victim's foot. *Id.* The Virginia Court of Appeals upheld the defendant's conviction for unlawful wounding, finding sufficient "'reckless and wanton'" intent as "it reasonably could have been

anticipated that the bullet would be deflected." *Id.* at 578 (quoting *State v. Anania*, 340 A.2d 207, 211 (Me. 1975) (emphasis deleted)). The court quoted at length from a Maine case explicitly stating that criminal intent could be inferred "from intentionally doing an act which has the inherent potential of doing bodily harm, and doing so in a criminally negligent manner." *Id.* (quoting *Anania*, 340 A.2d at 211).

The defendant in *Shimhue v. Commonwealth* fired into the floor of his apartment, apparently to frighten his girlfriend so that she would leave. No. 1736-97-2, 1998 WL 345519, at *1 (Va. Ct. App. June 30, 1998) (memorandum opinion). The defendant was not aware until the police arrived that the bullet, passing through the floor, had wounded a tenant in the leg. *Id.* n.1. Again, the Court of Appeals inferred intent to wound from conduct that was at most reckless, reasoning that the defendant "must have known" the gunshots "could result in severe bodily harm or death," and emphasizing that the defendant's conduct "was inherently dangerous and imposed grave risk." *Id.* at *2. Although the defendant did intend to frighten his girlfriend, the Court of Appeals explicitly stated that "[t]his case does not turn on the doctrine of transferred intent." *Id.* at *2. The Court of Appeals instead focused on the dangerous nature of the defendant's act. *Id.*

The language of both cases tracks the usual definitions of negligence or recklessness. Recklessness requires one to "consciously disregard[] a substantial and unjustifiable risk," and "[a] person acts negligently . . . when he should be aware of

a substantial and unjustifiable risk." Model Penal Code § 2.02(1). In both *David* and *Shimhue* the Court of Appeals emphasized the significance of the risk. *David*, 340 S.E.2d at 578; *Shimhue*, 1998 WL 345519, at *2. It stated that the risk "could have been anticipated," *David*, 340 S.E.2d at 578, or "must have [been] known," *Shimhue*, 1998 WL 345519, at *2. In neither case was the unfortunate result intended or "practically certain," as is required for a mens rea of "knowingly."

One final case confirms that reckless conduct, not directed at other persons or their property, is sufficient grounds for conviction under § 18.2-51. In *Knight v. Commonwealth*, the defendant was driving his girlfriend's uncle to the Department of Motor Vehicles on a "clear and dry afternoon." *See* 733 S.E.2d 701, 702 (Va. Ct. App. 2012). The defendant was seen "driving at dangerously excessive speeds," estimated at 77 to 107 miles per hour, on a road with a speed limit of 35 miles per hour. *Id.* at 702-703. The defendant's vehicle collided with another car, resulting in severe injuries *Id.* at 704. But before the collision, the defendant used his brakes, "resulting in a thirty-mile-per-hour decrease in speed." *Id.* at 710-11 (Elder, J., dissenting). As the dissent concluded, the defendant clearly did not intend to crash his car. *Id.* at 710 (quoting *Essex v. Commonwealth*, 322 S.E.2d 216, 222 (Va. 1984)). But the Virginia Court of Appeals found his conduct to fall into a category of "extreme indifference to the value of human life" that elevated it above mere negligence or recklessness and was sufficient to show malice. *See id.* at 707-708

(majority opinion) (quoting *Essex*, 322 S.E.2d at 222). The Court of Appeals affirmed the conviction for malicious wounding. *Id.* at 702.

David, *Shimhue*, and *Knight* show that Va. Code Ann. § 18.2-51 clearly can be violated by only reckless conduct, so long as the recklessness is sufficiently extreme. Other observers have reached the same conclusion. The Virginia Practice series states that "the current law seems to equate § 18.2-51 'intent' with the mental state required for second degree murder," a mental state that "includes extreme recklessness." Ronald J. Bacigal & Corinna Barrett Lain, 7 *Virginia Practice Series* 49 (2020-2021 ed. 2020) (entry for "assault, battery, and wounding").

In *Rumley v. United States*, this Court considered a defendant's argument that § 18.2-51 is not categorically a "violent felony" under the force clause of the ACCA, because it can be violated "by omission." 952 F.3d 538, 551 (4th Cir. 2020); *see also* Br. of Appellant in No. 19-4412, 2019 WL 4689103, at *18 (Sep. 24, 2019) ("Virginia unlawful wounding is not a violent felony because it can be committed by omission"). The panel rejected the defendant's argument that causing injury through omission is not a use of force (with Judge Motz concurring only in the judgment), and then stated that since the statute "requires . . . the specific intent to cause severe and permanent injury" it "categorically involves 'the use of physical force' within the meaning of ACCA." *Id.* at 550. This Court very recently applied

Rumley to reach a similar conclusion under 18 U.S.C. § 16(a). *See Moreno-Osorio v. Garland*, No. 20-1035, __ F.3d __, 2021 WL 2557789 (4th Cir. June 23, 2021).

But the premise that § 18.2-51 requires specific intent to cause injury was "neither briefed nor disputed" in *Rumley* and *Moreno-Osorio* and therefore should not be regarded as a binding holding. *United States v. Norman*, 935 F.3d 232, 240-41 (2019). As *Norman* explains, both this Court and the Supreme Court have held repeatedly that uncontested assumptions in prior decisions are not controlling, even when they relate to threshold questions that were necessarily at issue—like jurisdiction. *See id.* (collecting cases). While § 18.2-51 facially requires "intent" to wound, this Court will (when the issue is contested) look to "'the interpretation of [the] offense articulated by that state's courts'" for evidence that the statute is actually applied in a manner that categorically matches the federal requirements. *United States v. Dinkins*, 928 F.3d 349, 354 (4th Cir. 2019) (quoting *United States v. Bell*, 901 F.3d 455, 469 (4th Cir. 2018)) (second alteration added by court). Where an offense appears to require intent, but that "intent" can be established through a nonqualifying mens rea, the crime is not a crime of violence. *United States v. Simmons*, 917 F.3d 312, 319, 321 (4th Cir. 2019), *as amended* (Mar. 6, 2019). The *Rumley* and *Moreno-Osorio* panels apparently were given no opportunity to consider whether the Virginia courts permit the "intent" to wound required by § 18.2-51 to

be inferred from recklessness or negligence, and therefore their decisions should not be regarded as deciding that issue.

CONCLUSION

The crimes to which Mr. Manley pled guilty in Counts 25 and 35 of the indictment can be committed through recklessness or extreme recklessness, and therefore do not satisfy the use of force clause in 18 U.S.C. § 924(c)(3)(A) after the Supreme Court's decision in *Borden.* Those convictions should be vacated.

REQUEST FOR ORAL ARGUMENT

Counsel for appellant assert that the issue raised in this brief may be more fully developed through oral argument, and respectfully request the same.

Respectfully submitted,

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Dated: July 7, 2021

Signed,

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