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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The Supreme Court held this summer in *Borden v. United States*, 141 S. Ct. 1817 (2021), that crimes that can be committed recklessly do not necessarily involve a "use" of force targeted "against the person or property" of another, within the meaning of statutes like 18 U.S.C. § 924(c)(3). Manley's opening brief demonstrated that the Supreme Court's reasoning clearly extends to "extreme recklessness" crimes. It also demonstrated—through 50-state surveys and an extensive discussion of the Virginia precedents—that both the federal and state predicate offenses in this case can be committed through recklessness or extreme recklessness.

Rather than engaging directly with those issues, the government spends the first 29 pages of its brief pretending that pre-*Borden* precedent necessarily establishes that assault with a dangerous weapon and second-degree murder satisfy the force clause. But those precedents were about whether indirect or *de minimis* force counts as violent force. They did not consider whether a "use" of force "against the person or property of another" requires a *mens rea* greater than recklessness. *Borden* requires a comprehensive re-appraisal of precedent in this area. The government cannot simply insist that because it won cases in the past involving similar (or even identical) statutes there is no need for further analysis.

When it finally addresses *Borden*'s holding, the government argues that extreme recklessness crimes necessarily satisfy the force clause because they involve

a known "practical certainty" of injury. That is incorrect. As *Borden* explains, a "practically certain" harm establishes *knowledge*, which the law treats as equivalent to intent. 141 S. Ct. at 1823. Extreme or "depraved heart" recklessness is still just recklessness, and the nationwide and Virginia precedents make clear that it can be satisfied by known risks falling far short of "practical certainty."

Finally, the government argues that because VICAR separately requires proof of a specific intent to gain or maintain position in a racketeering enterprise, every VICAR violation automatically satisfies the *mens rea* necessary for a force-clause violation. That also is incorrect. A gang member who discharges a gun into the air, drives a getaway car at high speeds, or sells contaminated heroin may perform those acts for the specific purpose of currying favor with the gang, and yet be only reckless or even negligent with respect to any "use" of force "against the person or property of another." 18 U.S.C. § 924(c)(3).

ARGUMENT

I. RECKLESSNESS AND EXTREME RECKLESSNESS DO NOT SATISFY THE FORCE CLAUSE UNDER *BORDEN*

We begin with the issue the government labors to avoid. *Borden* squarely held that "the phrase 'against another,' when modifying a volitional action like the 'use of force,' demands that the perpetrator direct his force at another individual," and that "[r]eckless conduct is not aimed in that prescribed manner." 141 S. Ct. at 1820. Manley's opening brief explained (at 17-24) that both the plurality's and Justice

Thomas's reasoning clearly apply to "extreme recklessness" as well. Extreme recklessness involves a more culpable disregard of substantial risks of death or grave bodily harm—but it is still just conscious disregard of a known risk, not conduct intentionally or knowingly directing force at another person.

The government's contrary argument rests on three pillars. First, the government argues that extreme recklessness requires knowledge of a "practical certainty" that force will be applied, quoting the First Circuit's conclusion in *United States v. Baez-Martinez* that "the defendant who shoots a gun into a crowded room has acted with malice aforethought precisely because there is a much higher probability—a practical certainty—that injury to another will result." U.S. Br. 31 (quoting *Baez-Martinez*, 950 F.3d 119, 127 (1st Cir. 2020)). But the case that *Baez-Martinez* cites (*see* 950 F.3d at 126) for the proposition that shooting a gun into a crowded room constitutes malice aforethought, *United States v. Begay*, 934 F.3d 1033 (9th Cir. 2019), does not say that extreme recklessness requires a "practical certainty" of harm. Indeed, *Begay* held that second-degree murder does not satisfy the force clause. *See* 950 F.3d at 1038.

The level of risk required for extreme recklessness is much lower than practical certainty. The *Borden* plurality carefully explained that a defendant who is "aware that [a] result is practically certain to follow from his conduct" has acted *knowingly*—a state of mind that the law treats as equivalent to actual intent, and

distinct from both forms of recklessness. 141 S. Ct. at 1823 (citation omitted). By contrast, the LaFave treatise cited in *Baez-Martinez* itself, *see* 950 F.3d at 125, noted that extreme recklessness may involve "far less than … substantial certainty" of harm. *See* Wayne R. LaFave & Austin W. Scott, 2 *Substantive Criminal Law* § 14.4(a), Westlaw (3d ed. database updated Oct. 2020). The quintessential example of depraved heart murder is Russian roulette—which, with a traditional revolver, would involve a 16.7% chance of death. *See Commonwealth v. Malone*, 47 A.2d 445 (Pa. 1946); *see also U.S. v. Pineda-Doval*, 614 F.3d 1019, 1039 (9th Cir. 2010) ("Classic examples of second-degree murder include shooting a gun into a room that the defendant knows to be occupied, a game of Russian roulette, and driving a car at very high speeds along a crowded main street."). And the fact that firing a gun into a crowded room is *an example* of extreme recklessness does not show that extreme recklessness requires at least that level of risk. Manley's opening brief cited a case where a 60% risk was enough to sustain a murder conviction, *see Commonwealth v. Ashburn*, 331 A.2d 167, 170 (Pa. 1975), and cases explaining that throwing a piece of lumber into the street, hiding a person in a car trunk, failing to train and control aggressive dogs, and a wide range of drunk or reckless driving conduct can all constitute extreme recklessness. Opening Br. 20-22.

The *Borden* plurality's careful explanation of these distinctions, and of how the juxtaposition of "use" and "against" requires deliberate (or at least knowing)

targeting, make clear that *Baez-Martinez* was wrongly decided. And indeed, two Ninth Circuit panels have held that *Borden* confirms that court's prior position that extreme recklessness does not satisfy the force clause. *See United States v. Young*, 2021 WL 3201103 (9th Cir. 2021) (holding that *Borden* confirms that federal VICAR murder and California second-degree murder are not crimes of violence because they could be committed with extreme recklessness); *United States v. Mejia-Quintanilla*, 2021 WL 3855509 (9th Cir. 2021) (California second-degree murder is not a crime of violence).

Second, the government argues that extreme recklessness crimes require "volitional" conduct, citing the Supreme Court of Virginia's opinion in *Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984). U.S. Br. 32. *Essex* does draw a distinction between "volitional action" and "inadvertence." *Essex*, 322 S.E.2d at 220. But by "volitional," the Supreme Court of Virginia just meant that the defendant has "willfully or purposefully, rather than negligently, embarked upon a course of wrongful conduct likely to cause death or great bodily harm." *Id.* To explain the difference between "volitional" recklessness and "inadvertent" negligence, the *Essex* court contrasted a driver who makes a deliberate choice to assume outrageous risks by driving into a crowd (potentially second-degree murder) with a driver who "accomplishes the same result inadvertently, because of grossly negligent driving"

(at most the negligence crime of involuntary manslaughter). *Essex*, 322 S.E.2d at 220.

All reckless conduct, as distinguished from mere negligence, requires a "volitional" act in the sense of a conscious decision to assume known risks. But that does not mean a reckless driver intended the resulting harm. *See* Restatement (Second) of Torts § 500, cmt. f (1965) ("While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it."). In *United States v. Woods*, the government advanced an argument very similar to its argument here—that "*consciously* disregard[ing] a substantial and unjustifiable risk … is itself the kind of voluntary and purposeful act" necessary to satisfy the ACCA's enhancement provisions. 576 F.3d 400, 410 (7th Cir. 2009).[1] The Seventh Circuit instead held that a drunk driver intends "both the act of drinking alcoholic beverages and the act of driving his car," but "he [is] reckless only with respect to the consequences of those acts." *Id*. And it explicitly rejected the government's argument that a volitional action supplies the specific intent required for an ACCA enhancement, noting that "[e]very crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome." *Id.* at 411. The court further explained that "this position [is] entirely consistent with the classic line that

[1] The government actually directed its argument in *Woods* to the ACCA's residual clause; it did not even try to argue that the force clause was satisfied. *Id.* at 410.

has been drawn between the *actus reus* and the *mens rea* of a criminal offense," and that "[t]he Government's argument not only blurs that line, it obliterates it." *Id.* at 410.

Like the ACCA provisions at issue in *Woods*, § 924(c)'s force clause requires proof that the defendant intended *an application of force*, not merely that he engaged in volitional conduct that happened to produce that result. The government's attempt to conflate that distinction would effectively overrule *Borden* and apply the force clause in *every* recklessness case. The government cites *United States v. Smith*, but voluntary manslaughter under North Carolina law requires proof of intent *to kill*, mitigated by "the heat of passion" or "provocation." 882 F.3d 460, 463 (4th Cir. 2018). It is "essentially a first-degree murder, where the defendant's reason is temporarily suspended by legally adequate provocation." *Id.* (citation omitted). By contrast, second-degree murder and other "extreme recklessness" crimes do not require intent to harm. As the Virginia Supreme Court explained in *Pugh v. Commonwealth*, "implied malice" (the Virginia term for extreme recklessness) is actually "'constructive malice'" in the sense that "'malice as such does not exist but the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.'" 292 S.E.2d 339, 341 (Va. 1982) (quoting 1 *Wharton's Criminal Law and Procedure* § 245 at 529 (1957)). That is why the mother in *Pugh* was guilty of extreme recklessness for pouring pepper in a child's

mouth even though she "didn't mean to kill her." *Id.* at 340. And it is why the legal standard for extreme recklessness does not "require[] proof that the defendant's actions were targeted at a particular individual or group of individuals." *Watson-Scott v. Commonwealth*, 835 S.E.2d 902, 904 (Va. 2019).

Third, the government invokes this Court's prior statement that "common sense" dictates that murder is always a crime of violence. U.S. Br. 28 (quoting *In re Irby*, 858 F.3d 231, 237 (4th Cir. 2017)). At this point, however, it is settled beyond question that the force clause has a very specific meaning, that the categorical approach often produces counter-intuitive results, and that common sense is a poor guide to the correct analysis. *See, e.g., United States v. Parral-Dominguez*, 794 F.3d 440, 446 (4th Cir. 2015) ("defer[ring] to . . . 'common sense' . . . would serve only as [a] distraction[] from the discrete, narrow assessment of a crime's underlying elements" required by the force clause). *Borden* itself holds that an assault aggravated under Tennessee law either by "caus[ing] serious bodily injury to another" or "us[ing] or display[ing] a deadly weapon" is not a crime of violence, despite what "common sense" would suggest. *See Borden*, 141 S. Ct. at 1822 (quoting Tenn. Code Ann. § 39–13–102(a)(2) (2003)). Justice Thomas concurred separately to acknowledge that the result was counter-intuitive and "at odds with the larger statutory scheme." *Id.* at 1834 (Thomas, J., concurring in the judgment). And Justice Kavanaugh's dissent in *Borden* is powerful precisely because "reckless

assaults and reckless homicides *are* violent crimes, as a matter of ordinary meaning." 141 S. Ct. at 1853 (Kavanaugh, J., dissenting). But Justice Kavanaugh and the colleagues joining him were in dissent, and they acknowledged that the plurality's and Justice Thomas's reasoning "will exclude from the ACCA many defendants who have committed serious violent offenses," including "reckless homicide," "reckless aggravated assault," "some convictions for intentional and knowing assaults" where the statute is indivisible, and perhaps "even second-degree murder." *Id.* at 1855-56.

II. ASSAULT WITH A DANGEROUS WEAPON CAN BE COMMITTED THROUGH RECKLESSNESS OR EXTREME RECKLESSNESS

A. Generic Assault With A Dangerous Weapon Requires Only A Showing Of Recklessness

Manley's opening brief explained that the categorical approach requires a generic definition of the elements of assault involving a dangerous weapon. Manley also offered a survey revealing that 36-39 of the 45 states that define a form of assault aggravated by a dangerous weapon permit conviction with a *mens rea* of recklessness or less. Opening Br. 33-36.

The government does not deny the need for a generic definition or offer an alternative generic definition of its own. It apparently contends that this Court is bound by pre-*Borden* precedent that somehow conclusively establishes that assaults involving dangerous weapons satisfy the force clause. Those arguments are unpersuasive for three reasons.

First, intervening Supreme Court precedent demands reappraisal of what has come before. The Tennessee statute at issue in *Borden* would have satisfied the force clause under the reasoning of the cases cited by the government. But the Supreme Court reached the opposite conclusion.

Second, the government's argument fails on its own terms because both before and after *Borden* this Court and others have frequently held that assault with a deadly weapon offenses fail to satisfy the force clause if they could be committed recklessly or negligently. In *Garcia v. Gonzales,* 455 F.3d 465, 468 (4th Cir. 2006), this Court held that New York's assault with a dangerous weapon statute does not satisfy the force-clause definition of a "crime of violence" for immigration purposes (which is identical to § 924(c)), because it can be violated recklessly. This Court anticipated *Borden* in reasoning that the holding of *Leocal v. Ashcroft*, 543 U.S. 1 (2004), applies to crimes of recklessness as well as negligence. *See Garcia*, 455 F.3d at 468-69 (citing *Bejarano–Urrutia v. Gonzales*, 413 F.3d 444 (4th Cir.2005)). And this Court held that New York's statute did not define a crime of violence even though it requires the "caus[ation] [of] serious physical injury to another person by means of a deadly weapon or dangerous instrument." *Id.* Similarly, in *United States v. Simmons,* 917 F.3d 312, 321 (4th Cir. 2019), this Court held that North Carolina's crime of assault with a deadly weapon on a government official was not categorically

a crime of violence because that crime could be committed negligently.[2] This Court did not conclude, as the government argues here, that the use of a deadly weapon necessarily satisfies the force clause. Other circuits have reached the same conclusion. *See, e.g., United States v. Rose,* 896 F.3d 104, 114 (1st Cir. 2018) (Rhode Island assault with a dangerous weapon could be violated recklessly and therefore was not an ACCA "violent felony"); *United States v. Kennedy,* 881 F.3d 14, 19 (1st Cir. 2018) (same for Massachusetts assault and battery with a dangerous weapon); *United States v. Parnell*, 818 F.3d 974, 981 n. 5 (9th Cir. 2016) (also considering the Massachusetts statute).

Post-*Borden*, this Court and others have confirmed that assault with a dangerous weapon offenses do not categorically satisfy the force clause if the crime can be committed recklessly. In *United States v. Barnes*, this Court held in an unpublished opinion that assault with a dangerous weapon under District of Columbia law is not a violent felony under the ACCA post-*Borden* because it "is well established that convictions for assault with a dangerous weapon . . . have been

[2] In *Simmons* this Court noted prior precedent stating that "a substantial majority of U.S. jurisdictions require *more* than extreme indifference recklessness to commit aggravated assault." 917 F.3d at 319 (citations omitted). But the Ninth Circuit authority cited for that survey clarifies that, for reasons particular to that case, it counted statutes requiring any additional "narrowing element, such as the use of a deadly weapon," as "requiring a mens rea of more than extreme indifference recklessness." *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086 n.5 (9th Cir. 2015). That methodology is obviously inapposite when, as here, the question is the *mens rea* of generic assault with a deadly weapon.

'sustained . . . based on reckless conduct.'" 855 F. App'x 893, 894 (4th Cir. 2021) (citations omitted). The Sixth Circuit unsurprisingly reached the same conclusion about the Tennessee statute at issue in *Borden* itself. *See United States v. Brenner*, 3 F.4th 305 (6th Cir. 2021). The Eleventh Circuit has held that assault aggravated by the use of a deadly weapon under Georgia law is not a crime of violence under the ACCA, because it "can be accomplished with a *mens rea* of recklessness." *United States v. Carter*, 7 F.4th 1039, 1045 (11th Cir. 2021). In a recent Eighth Circuit appeal, the United States *conceded* that a Texas aggravated assault statute that could be committed by "use[] or exhibit[ion] [of] a deadly weapon" while "intentionally, knowingly, or recklessly caus[ing] bodily injury to another" did not satisfy the ACCA force clause after *Borden. United States v. Hoxworth*, No. 19-1562, 2021 WL 3777648, at *2 (8th Cir. Aug. 26, 2021) (citations omitted). The government similarly conceded that New Mexico's aggravated assault with a deadly weapon statute "lacks the targeted conduct that the ACCA requires" post-*Borden*. Appellee's Answer Br. in *United States v. Gonzales*, No. 21-2022, 2021 WL 3236540, at *3-4 (10th Cir. 2021). The government noted that although that statute requires "the purposeful doing of an act that the law declares to be a crime" (*i.e.*, what the government calls "volitional" conduct in its present brief), it "does not require proof that the defendant intended to assault or harm the victim." *Id.*

Third, the government is relying on cases that did not consider the relevance of *mens rea* to the force clause, but that instead rejected arguments that the force clause is not satisfied by *de minimis* force, indirect force, or omissions. Those cases cannot be considered binding here, when the *mens rea* issue was "neither briefed nor disputed." *See United States v. Norman*, 935 F.3d 232, 240- 41 (4th Cir. 2019). As *Norman* explains, this Court and the Supreme Court have held repeatedly that prior decisions do not resolve issues they did not consider or address, even when those issues were logically necessary to the outcome. *See id.* (collecting cases).

The government begins with *United States v. Bryant,* 949 F.3d 168 (4th Cir. 2020), which interpreted 18 U.S.C. § 2114(a). That statute defines a "basic" crime of assaulting a mail carrier with intent to steal the mail, and an aggravated version "if in effecting or attempting to effect such robbery he wounds the person having custody of such mail . . . or puts his life in jeopardy by the use of a dangerous weapon . . . ." *Bryant* at 174. This Court joined several other circuits in holding that the use of a dangerous weapon to put the victim's life in jeopardy "ensures that at least the threat of physical force is present." *Id.* at 180 (citations omitted). But this Court's reasoning, and that of the cited cases, was that dangerous weapons inflict more than *de minimis* force. For example, this Court's parenthetical correctly acknowledged that the Sixth Circuit in *Knight v. United States* rejected the defendant's arguments because the involvement of a dangerous weapon elevated the threat of force above

a "mere offensive touching." *Id.* at 181 (citing *Knight*, 936 F.3d 495, 500 (6th Cir. 2019)).

All of the other cases cited in *Bryant*, and the additional cases cited on page 19 of the government's brief in this case, similarly reject arguments that an assault statute was not a crime of violence because it could be violated through indirect force, or force falling short of violence.[3] The government notes that the Sixth Circuit explicitly held that VICAR assault with a dangerous weapon is a crime of violence pre-*Borden*, consistent with that Circuit's broader conclusion that a dangerous weapon element "necessarily renders [an] offense a crime of violence." *Manners v. United States*, 947 F.3d 377, 380 (6th Cir. 2020). Again, however, those holdings were predicated on the Sixth Circuit's conclusion that a weapon "elevate[s] [a] lower degree of physical force into 'violent force' sufficient to establish … a 'crime of

[3] *See, e.g., Curtis-Johnson v. United States*, 559 U.S. 133 (2010) (mere touching is insufficient); *United States v. Bell*, 901 F.3d 455, 471 (4th Cir. 2018) (rejecting the defendant's argument that "armed robbery could be committed with de minimis force," and not discussing *mens rea*); *United States v. Evans*, 848 F.3d 242, 246 (4th Cir. 2017) (the term intimidation in the context of a carjacking "denotes a threat to use violent force," rather than, as the defendant suggested, "threatening to poison another"); *United States v. Kendall*, 876 F.3d 1264, 1270 (10th Cir. 2017) (discussing the level of "force significant enough to cause a painful bodily injury"); *Gray v. United States*, 980 F.3d 264, 267-69 (2d Cir. 2020) (rejecting the defendant's argument that one could be convicted of using a deadly weapon by "merely tap[ping] a Marshal with a nightstick"); *United States v. Gobert*, 943 F.3d 878, 881 (9th Cir. 2019) (citing *Johnson v. United States*, 559 U.S. 133, 140 (2010)) ("violent [physical] force" is "force capable of causing pain or injury to another person"); *United States v. Muskett*, 970 F.3d 1233, 1240 (10th Cir. 2020) (similarly considering the requisite *level* of force).

violence.'" *Id.* at 381 (quoting *United States v. Rafidi*, 829 F.3d 437, 446 (6th Cir. 2016)). These issues about the necessary *degree* of force were largely resolved by *United States v. Castleman*, 572 U.S. 157 (2014), and subsequent decisions like *Irby*, 858 F.3d 231 (4th Cir. 2017). But the defendants in these cases did not have the benefit of *Borden* and did not argue that the statutes in question might have failed to satisfy the force clause for the entirely different reason that they could be committed recklessly.

The only case cited by the government that actually addressed the *mens rea* dimension of the force clause was *United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017). There, the defendant argued that North Carolina robbery with a dangerous weapon did not require an intentional use of force. This Court reasoned that a "taking of property, by means of violence or intimidation sufficient to overcome a person's resistance, must entail more than accidental, negligent, or reckless conduct." *Id.* at 319 (citing *United States v. Doctor*, 842 F.3d 306, 311 (4th Cir. 2016)). This Court noted that the defendant did not cite a single case "in which a defendant was convicted of statutory armed robbery through the reckless, negligent, or accidental use of a dangerous weapon," and could not offer any "plausible explanation for how a defendant might intentionally steal a victim's property through such unintentional use, or unintentional threatened use of a weapon." *Id.*

The same is not true for assault. Assault is not a specific intent crime, and it is not at all difficult to imagine an assault—including an assault with a dangerous weapon—in which the defendant was merely reckless or even negligent. This Court has already recognized that possibility in cases like *Garcia v. Gonzales,* 455 F.3d 465 (4th Cir. 2006), and *United States v. Simmons,* 917 F.3d 312, 321 (4th Cir. 2019), discussed above. And of course the Supreme Court just held in *Borden* that Tennessee's aggravated assault statute did not satisfy the force clause. 141 S. Ct. 1817 (2021). The *Burns-Johnson* insight—that the commission of particular specific-intent crimes by means of a dangerous weapon may necessarily demonstrate an intent to use force—may ultimately justify the outcomes in some of the pre-*Borden* case law, such as *Bryant*. But that reasoning does not help the government here.

B. Virginia's Unlawful Wounding Statute Requires Only A Showing Of Recklessness

Manley's opening brief explained that it is not clear he pled guilty to the Virginia predicate crimes. Allegations concerning those statutes are incorporated by reference into the counts he pled guilty to, but the Virginia statutes are not mentioned in the plea agreement, statement of facts, or order accepting the plea. Opening Br. 37. The government has no response. But even if we assume that Manley pled guilty to the state crimes, they do not satisfy the force clause.

As anticipated, the government argues that this Court has already decided that Va. Code Ann. § 18.2-51 is a specific intent crime. *See* U.S. Br. § I(B) (citing *Moreno-Osorio v. Garland*, 2 F.4th 245 (4th Cir. 2021), and *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020)). As discussed in Manley's opening brief, *Rumley* did assume that was true from the face of the statute, and *Moreno-Osorio* followed *Rumley* in that assumption. But while § 18.2-51 facially appears to require "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 does not categorically match the federal requirements. *United States v. Dinkins*, 928 F.3d 349, 354 (4th Cir. 2019) (cleaned up). *That* issue does not appear to have been contested or considered in *Rumley* or *Moreno-Osorio.* Again, opinions are not binding authority on issues that were not argued or considered.

The government argues that a non-precedential decision cited in *Rumley*, *United States v. Jenkins*, 719 F. App'x. 241 (4th Cir. 2018), discusses the Virginia case law. But *Rumley* noted that *Jenkins* was an unpublished opinion and relied on it only for the proposition that "the intentional infliction of bodily harm requires a use of physical force *even if* the means used are indirect"—*not* for its mens rea analysis. *Rumley*, 952 F.3d at 550 (emphasis in original). And the *mens rea* analysis in *Jenkins* is incomplete and unpersuasive. The defendant did not argue that the

statute could be violated recklessly; instead, he made the familiar argument that *de minimis* force does not satisfy the statute. *Jenkins*, 719 F.App'x at 244. The *Jenkins* panel reasoned that a statute facially requiring intent to kill or seriously injure necessarily involves violent force. And it held that reasoning was "confirmed by state cases confining [the statute's] application to acts of violence." *Id.* at 245. But the cited Virginia cases were, unsurprisingly, about the *degree* of force necessary to violate the statute. *See id.* at 245-46.

Manley's opening brief explained that the Virginia Court of Appeals has upheld several convictions for violations of the unlawful wounding statute that clearly were premised on negligent or reckless behavior. Opening Br. at 40-43 (discussing *David v. Commonwealth*, 340 S.E.2d 576 (Va. Ct. App. 1986), *Shimhue v. Commonwealth*, No. 1736- 97-2, 1998 WL 345519 (Va. Ct. App. June 30, 1998) (memorandum opinion), *Knight v. Commonwealth*, 733 S.E.2d 701 (Va. Ct. App. 2012)). Virginia commentators confirm 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 on intent under Assault, Battery, and Wounding). This Court should not be led into a plainly erroneous interpretation of Virginia law by language in an unpublished panel opinion, from a case where the relevant issue was not appropriately presented or considered.

III. SECOND-DEGREE MURDER REQUIRES ONLY A SHOWING OF RECKLESSNESS

A. Generic Second-Degree Murder Requires Only Recklessness

Manley's opening brief demonstrated a strong nationwide consensus that generic second-degree murder can be committed through extreme recklessness. *See* Opening Br. § II(A). The government has essentially no response.

Instead, the government argues that this Court remains bound by its previous conclusion, in *Irby*, that federal second-degree murder is categorically a crime of violence. Again, however, the government cites precedent as binding on an issue that was neither argued nor decided. Like the assault cases discussed *supra*, *Irby* considered the *degree of force* necessary to satisfy the force clause, not the *mens rea* issue the Supreme Court recently addressed in *Borden*.

In *Irby*, the defendant was convicted of first-degree retaliatory murder, causing death with a firearm, and destruction of property by fire after he shot and stabbed a man he believed to be a government informant. *Id.* at 232-33. The defendant argued that second-degree retaliatory murder did not satisfy the force clause because it could be committed "without using direct force," such as by "pointing a laser at an airplane" or "convincing a child to jump out of a second-story window." *Id.* at 234 (cleaned up). This Court cited *Castleman* and *Curtis-Johnson* to hold that the force clause can be satisfied by a mere "offensive touching" and that "[i]t is impossible to cause bodily injury without applying force in the common law

sense." *Id.* at 235 (citations omitted). This Court also invoked the "common sense" observation that murder is a quintessential crime of violence, in ordinary parlance. *Id.* at 237. But nothing in *Irby* considers or decides whether an *application* of force sufficient to satisfy the common law "offensive touching" threshold might not constitute a "use" of force "against the person or property of another" because of the defendant's state of mind. Even the First Circuit in *Baez-Martinez*, while citing *Irby* favorably, recognized that this Court did "not consider[] the precise argument made here." 950 F.3d at 128. And, as explained above, "common sense" is an inadequate guide to the intricacies of the force clause.

The government does not deny the need for a generic definition of second-degree murder nor offer one of its own. Manley's survey revealed that the vast majority of states with a relevant definition of second-degree murder allow it to be committed with a mens rea of extreme recklessness. Opening Br. 33-36. The government does not take issue with that survey in any way.

B. Virginia Second-Degree Murder Requires Only Extreme Recklessness

If Virginia second-degree murder is relevant, it similarly requires only extreme recklessness. The government argues that Virginia second-degree murder is categorically a crime of violence because it requires proof of "volitional action" to establish malice. As explained *supra*, the government misunderstands the meaning of "volitional" in the context of a recklessness crime, particularly the

Supreme Court of Virginia's juxtaposition of "volitional" and "inadvertent" conduct in *Essex*.

It is settled beyond question that extreme or "depraved heart" recklessness is sufficient for conviction of second-degree murder in Virginia—which has recognized for nearly 200 years that a defendant is guilty of murder if he throws an object from a building in a populated city, when he knows there may be people below, and kills a passerby. *See Whiteford v. Commonwealth*, 27 Va. 721, 724–25 (Va. Gen. Ct. 1828). In *Watson-Scott*, the defendant fired a handgun down a street, resulting in the death of a nearby resident. That conduct was extremely reckless but "there was no evidence that Watson-Scott was shooting at anybody." 835 S.E.2d at 903. The Supreme Court of Virginia held that he nonetheless was guilty of second-degree murder on the basis of "implied malice," which does not "require[] proof that the defendant's actions were targeted at a particular individual or group of individuals." *Id.* at 904. Manley's opening brief demonstrated that Virginia's understanding of "extreme recklessness" or "depraved heart" murder is consistent with the nationwide consensus, and the government has no persuasive contrary argument. *See generally* Opening Br. § III(A) (collecting cases).

IV. VICAR'S PURPOSE REQUIREMENT DOES NOT SATISFY THE FORCE CLAUSE BY ITSELF

The government argues that the "purpose requirement in § 1959(a) eliminates the possibility that a VICAR crime could be committed recklessly." U.S. Br. 39.

Because VICAR requires that a defendant act with the purpose of maintaining his position in a criminal enterprise, the government's argument goes, all VICAR offenses are specific intent crimes. The problem with that argument is that the force clause requires proof of an intentional or knowing state of mind *with respect to a use or threatened use of force against a target.* A defendant can certainly engage in conduct with the specific intent to curry favor with a racketeering enterprise, but not simultaneously intend to use or threaten *force*, or know (with "practical certainty") that a use of force will result.

For example, the defendant in *Watson-Scott* who recklessly fired a gun down a street and ended up killing someone may have carried and fired the gun to show off to other gang members. Similarly, a defendant who drives a getaway car recklessly to evade police and kills someone may have driven in such a manner to demonstrate standing up to authority. And a defendant who drives drunk and causes serious bodily harm may have gotten behind the wheel because a fellow gang member had dared him to do so. *See, e.g., Leocal v. Ashcroft*, 543 U.S. 1 (2004). All of these defendants acted for the specific purpose of gaining or maintaining a position in a gang. They did not intend to use force or to target that force "against the person or property of another." *Borden*, 141 S. Ct. at 1826-27. Rather, they were simply reckless with respect to the use of force.

Or consider the extremely common fact pattern of a defendant who sells heroin as part of his gang responsibilities. The heroin supply chain is presently so contaminated with fentanyl, carfentanil, and other even more lethal substances that selling it is, obviously, extremely reckless and punishable as aggravated assault and second-degree murder. And, indeed, "drug-induced homicide" charges are very common, both under generic homicide statutes and specialized ones that may require reduce the *mens rea* even lower than extreme recklessness. *See, e.g., State v. Randolph*, 676 S.W.2d 943, 947-48 (Tenn. 1984) (sale of opiates can exhibit sufficient malice for second-degree murder); *State v. Parlee*, 703 S.E.2d 866, 869-70 (N.C. App. 2011) (same); Nevada Revised Statutes 453.333 (defendant is guilty of murder "[i]f the death of a person is proximately caused by a controlled substance which was sold, given, traded or otherwise made available to him or her by" the defendant).

The government cites *United States v. Runyon*, 994 F.3d 192 (4th Cir. 2021), and *United States v. Allred*, 942 F.3d 641 (2019), for the proposition that a heightened mens rea requirement automatically converts an act into a force-clause crime. But those cases involved predicate crimes that realistically required specific intent *to use force against another*—and, indeed, against a specifically targeted individual. In *Runyon*, the defendant was convicted of conspiracy to commit murder for hire and carjacking, resulting in death. This Court explained that the conspiracy

charge necessarily required "specific intent that a murder be committed for hire," and therefore also specific intent that force would be used against the person or property of another. 994 F.3d at 203; *see also, e.g.*, *Irby*, 858 F.3d at 236 ("it is hard to imagine conduct that can cause another to die that does not involve physical force against the body of the person killed" (cleaned up)). This Court considered the theoretical possibility that the intended force might not be the force ultimately applied—if, for example, the hired killer accidentally caused the victim to die in a car wreck. This Court concluded that such hypotheticals were outside the bounds of "realistic probability." 994 F.3d at 203-04. (It also is far from clear that the force clause would not apply in that hypothetical by its terms. Force "against another" was intended and applied—just by a different mechanism than the defendant anticipated).

Similarly, in *Allred*, the defendant challenged whether the force clause was satisfied by his conviction for intentionally retaliating against a witness and causing bodily harm as a result. This Court found it "difficult to imagine a realistic scenario in which a defendant would knowingly engage in conduct with the specific intent to retaliate against a witness and thereby only recklessly or negligently cause bodily injury." *Allred*, 942 F.3d at 654.

Manley's assault charge did not require any specific to kill, unlike the conspiracy charge in *Runyon.* And it is not at all "impossible to imagine a scenario

where a person could assault another individual with a dangerous weapon, while acting with the specific intent of increasing or maintaining his position in a criminal enterprise, 'without knowing or intending to inflict upon that person far more than a mere touch or scratch.'" U.S. Br. 50 (quoting *Allred*, 942 F.3d at 655). As explained above, such situations are easy to imagine, realistic, and common. Gang members engage in all sorts of reckless acts to maintain or improve their standing that involve dangerous weapons (*e.g.,* guns, cars, and drugs) and that may be prosecuted as an assault with that weapon.

The government's argument about the murder charges fares no better. A purpose of maintaining or improving one's position in a criminal enterprise certainly *does not* ensure "that a conviction for VICAR murder necessarily contains as an element the use, attempted use, or threatened use of physical force." U.S. Br. 52. It merely ensures that the defendant had a gang-related motive for engaging in the extremely reckless conduct that ultimately (but not intentionally) resulted in death. Again, the hypotheticals are not difficult to imagine and are not at all hypothetical. Driving a getaway car at outrageous speeds through a crowded street, firing a gun in the air or down a street, or selling dangerous drugs that later lead to an overdose all qualify as crimes that can be committed with the intention of serving a gang but with a *mens rea* of recklessness with regard to any application of force against another.

Lastly, the government cites cases like *United States v. Keene*, 955 F.3d 391 (4th Cir. 2020), and *United States v. Zelaya*, 908 F.3d 920 (4th Cir. 2018), for the proposition that the government carries its burden in a VICAR case if "the jury could properly infer that the defendant committed his violent crime because he knew it was expected of him by reason of his membership in the enterprise or that he committed it in furtherance of that membership." U.S. Br. 43 (quoting *Zelaya*, 908 F.3d at 927) (citation omitted). But those cases dealt with sufficiency of the evidence claims centered on whether the defendant had the specific intent, under VICAR, to further his gang membership. They did not hold that VICAR specific intent *also* establishes a violation of § 924(c) under the force clause.

CONCLUSION

Manley's § 924(c) convictions should be set aside, and he should resentenced.

Respectfully submitted,

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Dated: September 21, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger