IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6812

UNITED STATES OF AMERICA,

Appellee,

v.

MARTIN JAY MANLEY, A/K/A/ BUCK

Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia
at Newport News
The Honorable Rebecca Beach Smith, Senior District Judge

BRIEF OF THE UNITED STATES

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Introduction

Martin Manley, the defendant, was a member of the Dump Squad, a violent street gang operating in Newport News, Virginia. Members of the criminal organization distributed narcotics and committed acts of murder, attempted murder, robbery, assault, arson, and witness intimidation. In October 2006, the defendant learned that Jarice Royal, a rival gang member, was visiting an apartment complex considered to be Dump Squad territory. As Royal was leaving, the defendant repeatedly fired a gun into Royal's vehicle and shot him in the shoulder. In December 2007, the defendant started a fight at a nightclub. After being kicked out of the club, in the parking lot, the defendant singled out Tony Vaughan and shot him to death.

The defendant pleaded guilty to three counts, including conspiracy to engage in racketeering activity (Count 1) and two counts of using, carrying, brandishing, and discharging a firearm during a crime of violence (Counts 25 and 35). Counts 25 and 35 were both predicated on violations of the Violent Crimes in Aid of Racketeering ("VICAR") statute, 18 U.S.C. § 1959. Count 25 specified that the predicate crime of violence was the assault of Jarice Royal with a dangerous weapon, in violation of Va. Code § 18.2-51, in aid of racketeering activity. Count 35 specified that the predicate crime of violence was the murder of Tony

Vaughan, in violation of Va. Code § 18.2-32, in aid of racketeering activity. The district court ultimately sentenced the defendant to 480 months' imprisonment.

In this appeal from the denial of habeas relief, the defendant asks the Court to vacate his convictions on Counts 25 and 35. First, he maintains that Count 24 is not a valid predicate under 18 U.S.C. § 924(c)(3)(A) because VICAR assault with a dangerous weapon can be committed with a mens rea of recklessness and because unlawful wounding under Va. Code § 18.2-51 can be committed with a mens rea of extreme recklessness. Similarly, he maintains that Count 34 is not a valid predicate under § 924(c)(3)(A) because VICAR murder and second-degree murder under Va. Code § 18.2-32 can be committed with a mens rea of extreme recklessness. He maintains that after the Supreme Court's decision in *Borden v. United States*, 141 S. Ct. 1817, 1834 (2021) (plurality opinion) (holding that "[o]ffenses with a mens rea of recklessness do not qualify as violent felonies" under the Armed Career Criminal Act ("ACCA")), neither the VICAR predicates nor the state predicates contain as an element the use, attempted use, or threatened use of force.

This Court should affirm the judgment of the district court because Counts 24 and 34 are valid crime-of-violence predicates. First, VICAR assault with a dangerous weapon, based on a violation of Va. Code § 18.2-51, remains a valid predicate crime of violence under § 924(c)'s force clause. This Court has

consistently held that offenses with dangerous-weapon elements categorically involve the use of physical force against another, and the heightened mens rea requirement of VICAR assault with a dangerous weapon reinforces that the offense should not be excluded under *Borden*. Moreover, this Court has repeatedly held that unlawful wounding under Va. Code § 18.2-51 is a force-clause crime of violence, in part because it requires that the defendant acted with the specific intent to maim, disfigure, disable, or kill.

Second, VICAR murder, based on a violation of Va. Code § 18.2-32, remains a valid predicate crime of violence under § 924(c)'s force clause. This Court has already held that federal second-degree murder is categorically a crime of violence. Further, although second-degree murder under Va. Code § 18.2-32 can be committed with a mens rea of extreme recklessness, this highly culpable mental state satisfies the force clause.

Finally, even if the Court disagrees with the reasoning above, it should still reject the defendant's challenges to his convictions based on *Borden*. The VICAR statute requires that, in addition to the mens rea for the underlying crime (here, assault with a dangerous weapon and murder), the government must prove that the defendant acted for the purpose of increasing or maintaining his position in the criminal enterprise. Accordingly, it is not possible to commit the predicate VICAR

offenses recklessly. VICAR's heightened mens rea requirement by itself provides a sufficient basis to affirm the judgment of the district court.

Issues Presented

1. Is VICAR assault with a dangerous weapon, based on a violation of Va. Code § 18.2-51, a valid predicate crime of violence under § 924(c)'s force clause?

2. Is VICAR murder, based on a violation of Va. Code § 18.2-32, a valid predicate crime of violence under § 924(c)'s force clause?

Statement of the Case

The defendant was a member of a violent street gang that distributed narcotics and engaged in acts of violence. The defendant shot and wounded a member of a rival gang and shot and killed a man he encountered at a nightclub. He pleaded guilty to three counts, including one count of conspiracy to engage in racketeering activity and two counts of using, carrying, brandishing, and discharging a firearm during a crime of violence. The district court sentenced him to 480 months' imprisonment.

A. The defendant engages in racketeering activity as a member of the Dump Squad street gang.

From 2003 to 2009, the defendant was a member of the Dump Squad street gang, a criminal organization operating in Newport News, Virginia. JA95. Members of the Dump Squad "engaged in acts of narcotics distribution and

violence, including murder, attempted murder, robbery, assault, arson and witness intimidation to gain entrance into and enhance their status as members" of the gang. JA95–96.

Members of the Dump Squad identified one another using hand signs and tattoos. JA96. For example, the defendant had the number "17" tattooed on his hand to reflect "his affiliation with the gang" and the Dump Squad's "control of the area at 17th Street and Jefferson Avenue." JA96. Members of the gang also carried firearms "to intimidate others and protect themselves from rival gangs" in Newport News and from "outsiders from other cities." JA96. To mark certain locations "as being the territory they controlled," Dump Squad members spray-painted graffiti in the Ridley Circle, Dickerson Court, and Harbor Homes areas of Newport News. JA96.

The Dump Squad distributed narcotics, including cocaine and marijuana, in the Newport News area. JA96–97. Further, members of the gang purposefully "targeted rival drug dealers for robbery[] in an effort to obtain controlled substances and drug proceeds for use and distribution by 'Dump Squad' members." JA97.

B. The defendant shoots Jarice Royal, a rival gang member.

On October 4, 2006, the defendant learned that "Jarice Royal and another rival gang member were visiting females in the Ridley Circle apartment complex."

JA97. The Dump Squad considered Ridley Circle to be their “territory.” JA96. As Royal “and the other individual exited the apartment and headed towards a yellow pick-up truck,” a coconspirator signaled to Manley. JA97. Manley approached the truck “with a firearm drawn,” then fired repeatedly into the vehicle as Royal and the other individual tried to leave the parking lot. JA97. The defendant struck Royal with a bullet in the back of his left shoulder, and Royal “was treated for the gunshot wound” at a local hospital. JA97. Members of the Dump Squad later recorded a video of the defendant rapping and “boasting” about shooting Royal. JA97.

C. The defendant kills Tony Vaughan at a nightclub.

On December 24, 2007, the defendant and other members of the Dump Squad were at a nightclub in Hampton, Virginia. JA98. After someone bumped into the defendant on the dance floor, the defendant and other Dump Squad members started fighting with this individual. JA98. Management kicked everyone out of the club. JA98. In the parking lot, the defendant said to other Dump Squad members that “he was going to ‘drop’ the next person he saw.” JA98. The defendant then “spotted Tony Vaughan and began to fight with him.” JA98. While other members of the Dump Squad joined in “beating and kicking” Vaughan, the defendant “obtained a firearm and shot Tony Vaughan to death.”

JA98. The defendant and other Dump Squad members left the nightclub and returned to Newport News. JA98.

Officers with the Hampton Police Department responded to the scene and found Vaughan lying on the ground outside the nightclub. JA98. Vaughan was transported to the hospital, where he was declared dead. JA98. The medical examiner "observed multiple blunt force injuries to the head, torso, and extremities" and determined that the cause of death "was a single gunshot wound to the chest." JA98.

D. A grand jury indicts the defendant on ten counts related to racketeering activity.

On March 11, 2009, a grand jury returned a superseding indictment charging the defendant with ten counts as follows:

Table 1: Charges Against the Defendant

Count	Offense	Statutory Provisions
Count 1	Conspiracy to engage in racketeering activity	18 U.S.C. § 1962(d)
Count 2	Conspiracy to distribute and possess with intent to distribute cocaine base, cocaine, marijuana, ecstasy, and heroin	21 U.S.C. § 846
Count 3	Conspiracy to commit Hobbs Act robbery	18 U.S.C. § 1951(a)
Count 22	Hobbs Act robbery of drug trafficker D.D. on an unknown date in late summer or early fall 2006	18 U.S.C. § 1951(a)

Count	Offense	Statutory Provisions
Count 23	Use, carry, and brandish a firearm during a crime of violence—i.e., the robbery in Count 22	18 U.S.C. § 924(c)(1)
Count 24	Assault of Jarice Royal with a dangerous weapon, resulting in serious bodily injury, in violation of Va. Code Ann. § 18.2-51, in aid of racketeering activity	18 U.S.C. § 1959(a)(3)
Count 25	Use, carry, brandish, and discharge of a firearm during a crime of violence—i.e., the assault in Count 24	18 U.S.C. § 924(c)(1)
Count 33	Maiming of Tony Vaughan, in violation of Va. Code Ann. §§ 18.2-51 and 18.2-22, in aid of racketeering activity	18 U.S.C. § 1959(a)(2)
Count 34	Murder of Tony Vaughan, in violation of Va. Code Ann. § 18.2-32, in aid of racketeering activity	18 U.S.C. § 1959(a)(1)
Count 35	Use, carry, brandish, and discharge of a firearm during a crime of violence resulting in death—i.e., the murder in Count 34	18 U.S.C. §§ 924(c)(1) and (j)

JA11–36, 56–60, 70–74.

E. The defendant pleads guilty to three counts and receives a sentence of 480 months' imprisonment.

On October 19, 2009, the defendant pleaded guilty to Counts 1, 25, and 35 of the superseding indictment. JA84–85. The district court sentenced him to life plus 120 months' imprisonment, consisting of 360 months on Count 1, to be served concurrently with Count 35; 120 months on Count 25, to be served consecutively

to Count 35; and life imprisonment on Count 35. JA105. The defendant did not appeal his conviction or sentence.

On July 22, 2011, the district court reduced the defendant's sentence on Count 35 from life to 360 months' imprisonment. JA139.

F. The district court denies the defendant's motion to vacate his convictions on Counts 25 and 35.

On February 18, 2020, the defendant filed a pro se motion under 28 U.S.C. § 2255 to vacate his convictions on Counts 25 and 35 based on the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019). JA110–29. He reasoned that the predicate for his § 924(c) convictions on Counts 25 and 35 was conspiracy to engage in racketeering activity, in violation of 18 U.S.C. § 1962(d) (Count 1). JA127. Following *Davis*'s invalidation of the residual clause in § 924(c)(3)(B), the defendant argued, racketeering conspiracy "no longer qualifies as a 'crime of violence'" because it does not satisfy the force clause in § 924(c)(3)(A). JA127. Therefore, he asserted that his convictions on Counts 25 and 35 must be vacated for lack of a valid predicate. JA127.

On April 28, 2020, the district court denied the defendant's motion. First, the court explained that the predicate crime of violence for Count 25 was assault with a dangerous weapon in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(3), as charged in Count 24 of the superseding indictment. JA140. Relying on its decision in *Ellis v. United States*, — F. Supp. 3d —, 2020 WL

1844792, at *2 (E.D. Va. Apr. 10, 2020),[1] the court held that assault with a dangerous weapon in aid of racketeering activity is a valid predicate under § 924(c) "because it falls within the force clause." JA140.

Second, the court observed that the predicate crime of violence for Count 35 was murder in aid of racketeering activity, in violation of 18 U.S.C. § 1959(a)(1), as charged in Count 34 of the superseding indictment. JA141. Turning to the generic definition of the predicate offense, the court explained that "[t]he common law definition of murder is the unlawful killing of another human being with malice aforethought." JA141 (internal quotation marks omitted). Because "[c]ommon law murder certainly involves the use, attempted use, or threatened use of physical force against the person," the court concluded that murder in aid of racketeering activity "qualifies as a crime of violence under the force clause in § 924(c)(3)(A)." JA141–42 (internal quotation marks omitted). Finding that the

[1] In *Ellis*, the district court "look[ed] to the elements of the predicate offense as it is generically defined." 2020 WL 1844792, at *2 (internal quotation marks omitted). The court defined common law assault as 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." *Id.* (internal quotation marks omitted). Additionally, "§ 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." *Id.* (internal quotation marks omitted). The court concluded 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.* (quoting § 924(c)(3)(A)).

defendant's convictions on Counts 25 and 35 remained constitutionally valid after *Davis*, the district court denied his motion and denied a certificate of appealability. JA142–43.

On May 27, 2020, the defendant mailed a pro se notice of appeal. JA144. In December 2020, the Court placed this case in abeyance pending its decision in *In re Thomas*, 988 F.3d 783 (4th Cir. 2021). (ECF No. 12.) In April 2021, following its decision in *Thomas*, the Court granted the defendant a certificate of appealability and issued a briefing schedule. (ECF Nos. 14, 17.)

Summary of Argument

VICAR assault with a dangerous weapon, based on a violation of Va. Code § 18.2-51, categorically qualifies as a crime of violence under § 924(c)(3)(A). Federal generic assault with a dangerous weapon necessarily requires the use, attempted use, or threatened use of physical force against another because of the dangerous-weapon element. Both this Court and other courts of appeals consistently have held that a dangerous-weapon element like the one in § 1959(a)(3) confirms that a crime satisfies the force clause. Moreover, the Sixth Circuit has specifically held that VICAR assault with a dangerous weapon satisfies § 924(c)(3)(A), and no court of appeals has disagreed. And if the Court looks through the VICAR predicate to the state-law crime, Virginia unlawful wounding is also a force-clause crime of violence because this Court has repeatedly held that

Va. Code § 18.2-51, which requires that the defendant acted with the specific intent to maim, disfigure, disable, or kill, satisfies other force clauses.

Likewise, VICAR murder, based on a violation of Va. Code § 18.2-32, categorically qualifies as a crime of violence under § 924(c)(3)(A). Federal generic second-degree murder satisfies the force clause because this Court has already held that federal second-degree murder requires the use of force capable of causing physical pain or injury to another. Even if this Court could disregard its precedent, federal second-degree murder is a crime of violence because even a defendant who commits murder with a depraved heart exhibits a highly culpable mental state and has actively used force against another. Additionally, if the Court looks through the VICAR predicate to the state-law crime, Virginia second-degree murder is also a crime of violence because it requires that the defendant engaged in volitional action.

Finally, even if this Court disregards its precedent regarding offenses with dangerous-weapon elements, its precedent regarding Virginia unlawful wounding, and its precedent regarding second-degree murder, Counts 24 and 34 remain valid predicate crimes of violence. Any challenge based on *Borden v. United States*, 141 S. Ct. 1817 (2021) (plurality opinion), must fail because § 1959(a) carries a heightened mens rea requirement. The VICAR statute requires the government to prove that, in addition to the mens rea required for the enumerated offense (here,

assault with a dangerous weapon and murder), the defendant committed the offense for the purpose of increasing or maintaining his position (or the position of another) in the criminal enterprise. Therefore, even if the Court determines that VICAR assault with a dangerous weapon and VICAR murder can be committed with a mens rea of recklessness and extreme recklessness, respectively, VICAR's heightened mens rea requirement confirms that the minimum conduct proscribed by VICAR assault with a dangerous weapon and VICAR murder will involve more than the reckless or negligent application of force.

Accordingly, this Court should affirm the judgment of the district court.

Argument

Federal law proscribes the use of a firearm "during and in relation to any crime of violence." 18 U.S.C. § 924(c)(1)(A). Congress defined a "crime of violence" as "an offense that is a felony" and either "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" (the "force clause"), *id.* § 924(c)(3)(A), or "that 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" (the "residual clause"), *id.* § 924(c)(3)(B). In *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019), the Supreme Court held that the residual clause in § 924(c)(3)(B) is unconstitutionally vague. Consequently, the relevant inquiry here is whether VICAR assault with a

dangerous weapon and VICAR murder qualify as crimes of violence under the force clause, § 924(c)(3)(A). This Court "review[s] de novo the question whether an offense qualifies as a crime of violence." *United States v. Mathis*, 932 F.3d 242, 263 (4th Cir. 2019).

The VICAR statute prohibits specifically enumerated crimes (murder, maiming, assault, threatening to commit a crime of violence, and kidnapping) in violation of state or federal law. *See* 18 U.S.C. § 1959(a). Where, as here, a VICAR offense is based on a violation of state law, it satisfies § 924(c)(3)(A) if either the federal generic offense or the state predicate "has as an element the use, attempted use, or threatened use of physical force." In *United States v. Keene*, 955 F.3d 391, 397 (4th Cir. 2020), this Court held that the VICAR statute does not require a categorical match between the elements of the federal and state offenses. The Court reasoned that "[n]othing in th[e] language [of § 1959] suggests that the categorical approach should be used to compare the enumerated federal offense of assault with a dangerous weapon with the state offense of Virginia brandishing." *Id.* "In fact," the Court explained, "the most natural reading of the statute does not require any comparison whatsoever between the two offenses." *Id.*; *see also In re Thomas*, 988 F.3d 783, 791 (4th Cir. 2021) (citing *Keene* as holding that the Court is "not limited to considering whether the charged state-law predicate offenses are categorically crimes of violence independent of VICAR").

Instead, the Court determined that "Congress intended for individuals to be convicted" of a VICAR offense "by engaging in conduct that violated both th[e] enumerated federal offense as well as a state law offense, regardless whether the two offenses are a categorical 'match.'" *Keene*, 955 F.3d at 398–99. To convict a defendant of a VICAR offense, "a jury must find that he engaged in the conduct alleged in the indictment, namely," the enumerated federal offense in violation of state law. *Id.* at 399. Thus, "under the plain language of the VICAR statute, a defendant may be convicted when, by his conduct, he 'assaults' another person with a dangerous weapon 'in violation of' the state law charged in the indictment." *Id.* at 398.

Accordingly, the government may prove that a VICAR offense contains as an element the use, attempted use, or threatened use of force if *either* the federal offense or the state offense contains such an element (or, if both working together combine to do so). Because § 1959 requires that a defendant's conduct "constitute[s] one of the enumerated federal offenses as well as the charged state crime," the combination of elements forming the entire VICAR offense necessarily must contain the required element as well. *Id.* at 393. In this case, both the VICAR offenses charged in Counts 24 and 34 and their state-law predicates categorically qualify as crimes of violence under § 924(c)(3)(A).

I. VICAR assault with a dangerous weapon, based on a violation of Va. Code § 18.2-51, is a force-clause crime of violence.

The defendant pleaded guilty to Count 25 of the superseding indictment, which charged him with using, carrying, brandishing, and discharging a firearm in furtherance of a crime of violence, specifically, the assault in Count 24. JA60, 84. Count 24, in turn, charged the defendant with assault with a dangerous weapon, resulting in serious bodily injury, in violation of Va. Code § 18.2-51, for the purpose of gaining entrance to and maintaining and increasing his position in an enterprise engaged in racketeering activity. JA58–59. Count 24 is a valid predicate crime of violence because both the federal offense and the state-law predicate involve the use, attempted use, or threatened use of physical force. *See Keene*, 955 F.3d at 397.[2]

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[2] The government focuses in this brief on assault with a dangerous weapon under § 1959(a)(3) and does not address assault resulting in serious bodily injury under the same provision. This Court has already held that an offense requiring proof of intentionally causing bodily injury satisfies ACCA's force clause. *See United States v. Allred*, 942 F.3d 641, 654 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 1235 (2020). Further, because assault resulting in serious bodily injury under § 1959(a)(3) requires proof of different elements than assault with a dangerous weapon under § 1959(a)(3), the statute is divisible. *See Allred*, 942 F.3d at 648 (explaining that "[a] divisible statute is one that includes multiple alternative elements that create different versions of the crime" (internal quotation marks omitted)). Manley does not contend otherwise.

A. Federal generic assault with a dangerous weapon is a force-clause crime of violence.

VICAR assault with a dangerous weapon necessarily requires the use, attempted use, or threatened use of physical force against another. As this Court's and other circuits' precedent shows, the "dangerous weapon" element removes any doubt that federal generic assault with a dangerous weapon satisfies § 924(c)(3)(A).

This Court has held that assault on a postal employee with a dangerous weapon, in violation of 18 U.S.C. § 2114(a), is categorically a crime of violence under § 924(c)(3)(A) because of the statute's "requirement that the defendant use a dangerous weapon to put the victim's life in jeopardy." *United States v. Bryant*, 949 F.3d 168, 180 (4th Cir. 2020). The reasoning of *Bryant* compels the same conclusion here.

In *Bryant*, this Court examined the conduct proscribed by § 2114(a), which provides:

> A person who assaults any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or robs or attempts to rob any such person of mail matter, or of any money, or other property of the United States, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he wounds the person having such custody of such mail, money, or other property of the United States, or *puts his life in jeopardy by the use of a dangerous weapon*, or for a subsequent offense, shall be imprisoned not more than twenty-five years.

18 U.S.C. § 2114(a) (emphasis added).

While observing that "assault requires at least *some* use or threatened use of force," *Bryant*, 949 F.3d at 181, the Court concluded that "the additional life-in-jeopardy-with-a-dangerous-weapon element . . . is capable of transforming any of the basic offenses enumerated in the first clause [of § 2114], including assault, into a crime of violence." *Id.* at 180 n.10. *Bryant* also noted that in *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010), the Supreme Court quoted with approval "a definition of a violent felony as '[a] crime characterized by extreme physical force, such as murder, forcible rape, and *assault and battery with a dangerous weapon*.'" *Id.* at 181 (quoting *In re Irby*, 858 F.3d 231, 236 (4th Cir. 2017)). Therefore, the Court concluded that "§ 2114(a)'s requirement that the defendant use 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 (quoting *Knight v. United States*, 936 F.3d 495, 500 (6th Cir. 2019)).

Bryant is consistent with decisions of this Court determining that state-law offenses with dangerous-weapon elements satisfy ACCA's force clause. *See, e.g.*, *United States v. Bell*, 901 F.3d 455, 472 (4th Cir. 2018) (holding that Maryland robbery with a dangerous or deadly weapon categorically qualifies as violent felony under 18 U.S.C. § 924(e)), *cert. denied*, 140 S. Ct. 123 (2019); *United States v. Burns-Johnson*, 864 F.3d 313, 317–18 (4th Cir.) (holding that North

Carolina robbery with a dangerous weapon categorically qualifies as a violent felony under § 924(e)), *cert. denied*, 138 S. Ct. 461 (2017).

Similarly, other courts of appeals have concluded that federal statutes with dangerous-weapon elements categorically qualify as crimes of violence under § 924(c)(3)(A). *See, e.g.*, *Gray v. United States*, 980 F.3d 264, 266–67 (2d Cir. 2020) (per curiam) (holding that assault on a federal officer with a deadly or dangerous weapon, in violation of 18 U.S.C. § 111(b), is categorically a crime of violence under § 924(c)(3)(A)); *United States v. Kendall*, 876 F.3d 1264, 1271 (10th Cir. 2017) (same), *cert. denied*, 138 S. Ct. 1582 (2018); *United States v. Muskett*, 970 F.3d 1233, 1241–42 (10th Cir. 2020) (holding that assault with a dangerous weapon, in violation of 18 U.S.C. § 113(a)(3), is categorically a crime of violence under § 924(c)(3)(A)), *cert. denied*, 141 S. Ct. 1710 (2021); *United States v. Gobert*, 943 F.3d 878, 882 (9th Cir. 2019) (same); *Knight v. United States*, 936 F.3d 495, 499 (6th Cir. 2019) (holding that assault on a postal employee with a dangerous weapon, in violation of 18 U.S.C. § 2114(a), is categorically a crime of violence under § 924(c)(3)(A)).

In the same way, here, federal generic assault with a dangerous weapon necessarily involves the use, attempted use, or threatened use of physical force. In *Bryant*, this Court explained that "the additional life-in-jeopardy-with-a-dangerous-weapon element" in § 2114(a) was "capable of transforming any of the

basic offenses enumerated in the first clause, including assault, into a crime of violence." 949 F.3d at 180 n.10. That logic applies with equal force to the dangerous-weapon element in § 1959(a)(3).

Indeed, at least one circuit has concluded that "the 'dangerous weapon' part of 'assault with a dangerous weapon in aid of racketeering' … necessarily renders this offense a crime of violence" under § 924(c)(3)(A). *Manners v. United States*, 947 F.3d 377, 380 (6th Cir. 2020). The Sixth Circuit reasoned, consistent with its precedent in *Knight*, that assault offenses requiring the use of dangerous weapons are crimes of violence. *See Manners*, 947 F.3d at 381–82. Consequently, it is significant that this Court relied on *Knight* when it reached a similar conclusion in *Bryant*. *See* 949 F.3d at 180 ("[W]e join those circuits that have held that § 2114(a)'s requirement that the defendant use a dangerous weapon to put the victim's life in jeopardy 'ensures that at least the threat of physical force is present.'" (quoting *Knight*, 936 F.3d at 500)).

Accordingly, federal generic assault with a dangerous weapon has as an element the use, attempted use, or threatened use of physical force and qualifies as a crime of violence under § 924(c)(3)(A). *Cf. Thomas v. United States*, No. 2:11-cr-58 (RAJ), 2021 WL 3493493, at *7 (E.D. Va. Aug. 9, 2021) ("[I]nherent in placing another in reasonable apprehension of immediate harm *with a dangerous weapon* is that the offender intended to commit the assault *with violent force*.");

Prayer v. United States, No. 2:11-cr-58-7 (RAJ), 2020 WL 5793427, at *2 (E.D. Va. Sept. 28, 2020) ("Because assault with a dangerous weapon necessarily contemplates the use or threatened use of physical force, courts in the Fourth Circuit have routinely held it satisfies the requirements of a crime of violence under § 924(c)(3)(A)."); *Tweedy v. United States*, No. 1:13-cr-350-13 (LMB), 2020 WL 3513699, at *4 (E.D. Va. June 29, 2020) (holding that "'assault with a dangerous weapon' in aid of racketeering activity satisfies the requirements of § 924(c)'s force clause").

B. Virginia unlawful wounding is also a force-clause crime of violence.

If the Court looks through the VICAR predicate to the underlying state-law offense charged in Count 24, Virginia unlawful wounding is also a force-clause crime of violence. Va. Code § 18.2-51 proscribes wounding another person either unlawfully or maliciously. The statute provides:

> If any person maliciously shoot[s], stab[s], cut[s], or wound[s] any person or by any means cause[s] him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.

Va. Code Ann. § 18.2-51.

This Court has consistently held that Va. Code § 18.2-51 is a crime of violence for purposes of other force clauses. *See, e.g., United States v. Hardy*, 999

F.3d 250, 257 n.4 (4th Cir. 2021). In *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 1284 (2021), the Court considered whether Virginia's unlawful wounding statute was categorically a violent felony under ACCA's force clause. The Court explained that "the minimum conduct necessary for conviction under § 18.2-51 is 'caus[ing] [a person] bodily injury' by any means and 'with the intent to maim, disfigure, disable, or kill.'" *Id.* at 550 (quoting Va. Code Ann. § 18.2-51). The Court observed that the Virginia statute requires not only "the causation of bodily injury," but also "that the person causing the injury have acted with the specific intent to cause severe and permanent injury—maiming, disfigurement, permanent disability, or death." *Id.* Therefore, the Court concluded that "[s]uch a crime categorically involves 'the use of physical force' within the meaning of ACCA." *Id.*

More recently, after the Supreme Court decided *Borden*, this Court held that Va. Code § 18.2-51 is a crime of violence, and therefore an aggravated felony, under the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43). *Moreno-Osorio v. Garland*, 2 F.4th 245, 253 (4th Cir. 2021). The Court explained that "*Rumley*'s rationale mandates the conclusion [] that Virginia Code § 18.2-51 is a 'crime of violence' under 18 U.S.C. § 16(a), since it has as an element the use of 'physical force.'" *Id.*

The defendant insists that *Rumley* and *Moreno-Osorio* do not control here because in those cases, the Court did not have the "opportunity to consider whether the Virginia courts permit the 'intent' to wound required by § 18.2-51 to be inferred from recklessness or negligence." Def. Br. 44–45. *Rumley*, however, cited with approval the Court's previous unpublished decisions concluding that Va. Code § 18.2-51 is a crime of violence, including a case where the Court discussed the requisite mens rea at length. 952 F.3d at 550.[3]

For example, in *Jenkins*, the defendant argued that Va. Code § 18.2-51 does not "categorically require violent force" because "bodily injury" could "include injuries caused by de minimis force" or injury "through indirect means." 719 F. App'x at 244. The Court disagreed, relying on "§ 18.2-51's *mens rea* element, requiring the specific intent to kill or seriously injure the victim." *Id.* at 244–45. The Court reasoned that "[i]f a perpetrator specifically intends to 'maim, disfigure, disable, or kill,' then as a practical matter, the means employed toward that end will involve violent force." *Id.* at 245. In other words, the Court

[3] *See United States v. Mitchell*, 774 F. App'x 138, 139–40 (4th Cir. 2019) (per curiam) (holding that Virginia unlawful wounding is categorically a violent felony under ACCA's force clause), *cert. denied*, 140 S. Ct. 1167 (2020); *United States v. Jenkins*, 719 F. App'x 241, 245 (4th Cir.) (same), *cert. denied*, 139 S. Ct. 157 (2018); *United States v. Candiloro*, 322 F. App'x 332, 333 (4th Cir. 2009) (per curiam) (same); *see also United States v. James*, 718 F. App'x 201, 204 (4th Cir. 2018) (holding that Virginia unlawful wounding is categorically a crime of violence under the career-offender sentencing guideline).

explained, "it is not plausible that a conviction requiring an intent to kill or severely injure will rest on conduct that is incapable of fulfilling that intent, unless that conduct is accompanied by an 'attempt[]' or 'threat[]' to do more serious bodily harm, as delineated by the force clause." *Id.* (citing § 924(e)(2)(B)(i)).

The Court has since repeatedly recognized that Va. Code § 18.2-51 carries a specific intent requirement. *See Moreno-Osorio*, 2 F.4th at 253; *Rumley*, 952 F.3d at 550; *Jenkins*, 719 F. App'x at 245. The Court necessarily ruled out the possibility that the offense could be committed recklessly. *See United States v. Townsend*, 886 F.3d 441, 445 (4th Cir. 2018) (reasoning that North Carolina assault with a deadly weapon with intent to kill and inflicting serious injury required proof of "a mens rea greater than negligence or recklessness" because it required "proof of a specific intent to kill"). Thus, the requirement that a person convicted under Va. Code § 18.2-51 must have acted "with the intent to maim, disfigure, disable, or kill" satisfies the force clause's mens rea requirement. *Cf. United States v. Velazquez-Fontanez*, 6 F.4th 205, 219 (1st Cir. 2021) (holding that the defendant's conviction for drive-by shooting murder, in violation of 18 U.S.C. § 36(b)(2)(A), satisfied § 924(c)(3)(A)'s mens rea requirement after *Borden* because "a violator of section 36(b)(2) must undertake that violent force 'with the intent to intimidate, harass, injure, or maim'"); *see United States v. Cobo-Raymundo*, 493 F. App'x 848, 850 (9th Cir. 2012) (holding that Va. Code

§ 18.2-51 is a crime of violence under the sentencing guidelines, reasoning that "§ 18.2-51 clearly requires the intentional use of physical force, because it contains as an element 'the intent to maim, disfigure, disable, or kill'"). Moreover, even if the Court determines that Virginia unlawful wounding can be committed with a depraved heart, for the reasons discussed below, that mental state would satisfy the force clause. *See infra* Part II.

In any event, even if the Court departs from its precedent and determines that Va. Code § 18.2-51 does not satisfy the force clause, Count 24 remains a valid predicate under § 924(c)(3)(A) because of VICAR's purpose requirement. *See infra* Part III. After *Keene*, a VICAR offense based on a violation of state law is a force-clause crime of violence if either the federal offense or the state crime contains as an element the use, attempted use, or threatened use of physical force. *See* 955 F.3d at 398–99 (holding that "Congress intended for individuals to be convicted" of a VICAR offense "by engaging in conduct that violated both th[e] enumerated federal offense as well as a state law offense, regardless whether the two offenses are a categorical 'match'"); *see also In re Thomas*, 988 F.3d at 791 (noting that the Court is "not limited to considering whether the charged state-law predicate offenses are categorically crimes of violence independent of VICAR"). Because a conviction for VICAR assault with a dangerous weapon requires, in addition to the mens rea required for assault, proof that the defendant acted for the

purpose of increasing or maintaining his position in the criminal enterprise, VICAR's heightened mens rea requirement ensures that the defendant's conduct is "opposed to or directed at another." *Borden*, 141 S. Ct. at 1827.

At minimum, VICAR assault with a dangerous weapon includes as an element the use, attempted use, or threatened use of physical force. Therefore, VICAR assault with a dangerous weapon, based on a violation of Va. Code § 18.2-51, is a crime of violence under § 924(c)(3)(A).

II. VICAR murder, based on a violation of Va. Code § 18.2-32, is a force-clause crime of violence.

The defendant also pleaded guilty to Count 35 of the superseding indictment, which charged him with using, carrying, brandishing, and discharging a firearm in furtherance of a crime of violence, specifically, the murder in Count 34. JA74, 84–85. Count 34, in turn, charged the defendant with murder, in violation of Va. Code § 18.2-32, for the purpose of gaining entrance to and maintaining and increasing his position in an enterprise engaged in racketeering activity. JA72–73. Count 34 is a valid predicate crime of violence because both the federal offense and the state-law predicate involve the use, attempted use, or threatened use of physical force. *See Keene*, 955 F.3d at 397.

A. Federal generic murder is a force-clause crime of violence.

The VICAR statute punishes anyone who, "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders … any individual in violation of the laws of any State or the United States." 18 U.S.C. § 1959(a). The federal murder statute defines murder as "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111(a). Further, the statute provides that:

> Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, escape, murder, kidnapping, treason, espionage, sabotage, aggravated sexual abuse or sexual abuse, child abuse, burglary, or robbery; or perpetrated as part of a pattern or practice of assault or torture against a child or children; or perpetrated from a premediated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree.
>
> Any other murder is murder in the second degree.

Id.

This Court has already held that federal second-degree murder is categorically a crime of violence under § 924(c)(3)(A). *In re Irby*, 858 F.3d 231, 238 (4th Cir. 2017). The defendant in *Irby* argued that his conviction for second-degree murder in retaliation against a witness or informant, in violation of 18 U.S.C. § 1513(a)(1)(B), was not categorically a force-clause crime of violence. *Id.* at 234. Citing the Supreme Court's decisions in *Curtis Johnson* and *United*

States v. Castleman, 572 U.S. 157 (2014), this Court concluded that "second-degree retaliatory murder is a crime of violence under the force clause because unlawfully killing another human being requires the use of force 'capable of causing physical pain or injury to another person.'" *Id.* at 236. Indeed, the Supreme Court "made this point when it quoted approvingly a definition of a violent felony as '[a] crime characterized by extreme physical force, such as murder, forcible rape, and assault and battery with a dangerous weapon.'" *Id.* (quoting *Curtis Johnson*, 559 U.S. at 140–41). The Court held that "one cannot unlawfully kill another human being without a use of physical force capable of causing physical pain or injury to another." *Id.* at 238. Therefore, the Court concluded, the defendant's conviction for second-degree retaliatory murder satisfied § 924(c)(3)(A). *Id.* Notably, the Court reached that result even though it had already held, before *Borden*, that an offense requiring a mens rea of ordinary recklessness generally does not satisfy the force clause. *See, e.g., United States v. McNeal*, 818 F.3d 141, 154–55 (4th Cir.), *cert. denied*, 137 S. Ct. 164 (2016).

In ruling that second-degree retaliatory murder is a crime of violence under § 924(c)(3)(A), this Court underscored two considerations. First, the Court emphasized that "in interpreting statutes," the Court must "use not only 'the statutory context, structure, history, and purpose,' but also [its] 'common sense' to avoid an absurd result." *Irby*, 858 F.3d at 237 (quoting *Abramski v. United States*,

573 U.S. 169, 179 (2014)). And "[c]ommon sense dictates that murder is categorically a crime of violence under the force clause." *Id.* Second, the Court noted that murder is a crime that the Supreme Court "has stated repeatedly has no comparison 'in terms of moral depravity and of the injury to the person' given its 'severity and irrevocability.'" *Id.* (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008)). Under the defendant's approach, however, "the most morally repugnant crime—murder—would not be a crime of violence while at the same time permitting many less-serious crimes to be so classified." *Id.* (internal quotation marks omitted). The Court rejected such an "illogical result." *Id.* (internal quotation marks omitted).[4]

The defendant contends that, after *Borden*, VICAR murder is not a crime of violence because federal generic murder can be committed with a mens rea of extreme recklessness. Def. Br. 25–28. But even if this Court could disregard its existing precedent, federal second-degree murder still satisfies the force clause because even depraved-heart murder categorically involves the use, attempted use, or threatened use of physical force.

[4] At least one other federal court of appeals has also concluded that federal second-degree murder is categorically a crime of violence under § 924(c)(3)(A). *See Thompson v. United States*, 924 F.3d 1153, 1158 (11th Cir. 2019), *cert. denied*, 140 S. Ct. 2769 (2020); *but see United States v. Randly Begay*, 934 F.3d 1033, 1041 (9th Cir. 2019).

This Court has recognized that the mens rea for federal second-degree murder, malice aforethought, "does not 'require proof of an intent to kill or injure.'" *United States v. Slager*, 912 F.3d 224, 235 (4th Cir. 2019) (quoting *United States v. Fleming*, 739 F.2d 945, 947 (4th Cir. 1984)). "Malice exists when the evidence demonstrates that the defendant acted 'with a heart that was without regard for the life and safety of others.'" *Id.* (quoting *Fleming*, 739 F.2d at 948). However, as at least one other circuit has concluded, extreme recklessness is sufficient to satisfy the force clause.

In *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020), *cert. denied*, No. 20-5075, 2021 WL 2519179 (U.S. June 21, 2021), the defendant argued that second-degree murder under Puerto Rico law could be committed recklessly and therefore was not categorically a violent felony under ACCA's force clause. *Id.* at 124. The First Circuit acknowledged that second-degree murder can be committed with a "depraved heart" mental state, "also referred to as 'reckless indifference' or 'extreme recklessness.'" *Id.* at 125. However, the First Circuit explained, "this 'depraved heart' type of mental state is consistently distinguished from ordinary recklessness." *Id.* at 126.

To illustrate the difference between ordinary recklessness and extreme recklessness, the First Circuit offered the following examples:

> [I]f a defendant 'shoot[s] a gun into a room that [he] knows to be occupied' and one of the occupants is killed, the defendant could be

> found guilty of murder because he acted not only recklessly, but with reckless indifference to human life. If, on the other hand, a defendant recklessly shoots a gun in the woods while hunting and kills another person, the defendant has merely committed manslaughter because the probability that death would result was much lower.

Id. (quoting *Randly Begay*, 934 F.3d at 1041). "[W]hat separates malice aforethought," the First Circuit explained, is "the 'extreme indifference to the value of human life.'" *Id.* at 127 (quoting Model Penal Code § 210.2(1)(b)). Consequently, "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." *Id.* "And the defendant certainly must be aware that there are potential victims before he can act with indifference toward them." *Id.* Therefore, the First Circuit concluded, a defendant who acts with extreme recklessness, as opposed to one who acts with ordinary recklessness, "can more fairly be said to have actively employed force (*i.e.*, 'use[d]' force) 'against the person of another.'" *Id.* Endorsing this Court's decision in *Irby*, the First Circuit held that "second-degree murder qualifies as a

violent felony under the ACCA even though the offense requires no showing of mens rea beyond malice-aforethought-variety recklessness." *Id.*[5]

Baez-Martinez is correct. Classic examples of depraved-heart murder involve defendants who knowingly or intentionally used force, standards which readily satisfy § 924(c)(3)(A). The only distinction between first-degree murder and depraved-heart murder is whether the defendant intentionally used force with the intent to kill a person or with extreme disregard of whether the use of force would kill. The Supreme Court of Virginia has illustrated that depraved-heart murder necessarily involves the intentional application of force:

> [F]or example, one who deliberately drives a car into a crowd of people at a high speed, not intending to kill or injur[e] any particular person, but rather seeking the perverse thrill of terrifying them and causing them to scatter, might be convicted of second-degree murder if death results. One who accomplishes the same result inadvertently, because of grossly negligent driving, causing him to lose control of his car, could be convicted only of involuntary manslaughter. In the first case the act was *volitional*; in the second it was inadvertent, however reckless and irresponsible.

Essex v. Commonwealth, 322 S.E.2d 216, 220 (Va. 1984) (emphasis added).

Accordingly, where a defendant acts with a depraved heart, he has easily "used"

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[5] Notably, the Supreme Court held the defendant's petition for a writ of certiorari in *Baez-Martinez* pending its decision in *Borden*. After the Supreme Court decided *Borden*, it denied the petition in *Baez-Martinez*. *See* No. 20-5075, 2021 WL 2519179 (U.S. June 21, 2021). It also denied the defendant's petition for rehearing. *See* No. 20-5075, 2021 WL 3711654 (U.S. Aug. 23, 2021).

force as contemplated by § 924(c)(3)(A). *Cf. United States v. Smith*, 882 F.3d 460, 464 (4th Cir.) ("*Leocal* makes clear that 'use' in the force clause of ACCA requires that the force involved in the qualifying offense be volitional, which it plainly is in a voluntary manslaughter conviction under North Carolina law. It is beyond dispute that the *intentional* use of force satisfies the *mens rea* requirement of ACCA's force clause." (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004))), *cert. denied*, 138 S. Ct. 2692 (2018).

For the same reasons, if the Court chooses to treat *Irby* as if it were not binding, the Court nevertheless should conclude that federal second-degree murder is a crime of violence because even a defendant who commits murder with a depraved heart has "actively" used force "against the person of another." *Baez-Martinez*, 950 F.3d at 127. *Borden* did not foreclose the possibility that an offense that can be committed with a mens rea of extreme recklessness satisfies the force clause. *See* 141 S. Ct. at 1825 n.4 (stating that the Court had "no occasion to address whether offenses" with the mental state of "depraved heart" or "extreme recklessness" "fall within the elements clause"); *cf. id.* at 1856 n.21 (Kavanaugh, J., dissenting) (noting that "counsel for Borden forthrightly acknowledged at oral argument that extreme recklessness crimes, such as depraved-heart murder, can still suffice under ACCA"). Although the plurality in *Borden* concluded that the force clause "excludes conduct, like recklessness, that is not directed or targeted at

another," 141 S. Ct. at 1833, the First Circuit correctly concluded that "heightened recklessness approaching knowledge does satisfy that standard," *Baez-Martinez*, 950 F.3d at 127.

Thus, even after *Borden*, "[c]ommon sense dictates that murder is categorically a crime of violence under the force clause." *Irby*, 858 F.3d at 237; *see Curtis Johnson*, 559 U.S. at 140–41 (citing with approval the definition of a violent felony as "[a] crime characterized by extreme physical force, such as *murder*, forcible rape, and assault and battery with a dangerous weapon" (emphasis added)). Under the defendant's approach, however, "the most morally repugnant crime—murder—would not be a crime of violence while at the same time permitting many less-serious crimes to be so classified." *Irby*, 858 F.3d at 237 (internal quotation marks omitted); *see Stokeling v. United States*, 139 S. Ct. 544, 551 (2019) (reasoning that "it would be anomalous to read 'force' as excluding the quintessential ACCA-predicate crime of robbery, despite the [1986] amendment's retention of the term 'force' and its stated intent to expand the number of qualifying offenses"). As it did in *Irby*, the Court should reject such an "illogical result" here. 858 F.3d at 237 (internal quotation marks omitted).

B. Virginia second-degree murder is also a force-clause crime of violence.

If the Court looks through the VICAR predicate to the underlying state-law offense charged in Count 34, Virginia second-degree murder is also a force-clause crime of violence. Virginia defines murder as follows:

> Murder, other than aggravated murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder of the first degree, punishable as a Class 2 felony.
>
> All murder other than aggravated murder and murder in the first degree is murder of the second degree and is punishable by confinement in a state correctional facility for not less than five nor more than forty years.

Va. Code Ann. § 18.2-32. Although this Court has held that Virginia first-degree murder is categorically a crime of violence under § 924(c)(3)(A), it has not had the occasion to address Virginia second-degree murder. *See Mathis*, 932 F.3d at 265.

Under Virginia law, second-degree murder "is defined as a malicious killing." *Woods v. Commonwealth*, 782 S.E.2d 613, 617 (Va. Ct. App. 2016). The "touchstone of malice is 'volitional action'—the wrongful act must be done intentionally." *Flanders v. Commonwealth*, 838 S.E.2d 51, 61 (Va. 2020) (quoting *Essex*, 322 S.E.2d at 220). "This requirement of volitional action is inconsistent with inadvertence." *Essex*, 322 S.E.2d at 220. Instead, "to elevate the crime to second-degree murder, the defendant must be shown to have wilfully or

purposefully, rather than negligently, embarked upon a course of wrongful conduct likely to cause death or great bodily harm." *Id.*

At the same time, Virginia courts recognize that "[m]alice may be either express or implied by conduct." *Id.* Express malice exists "when one person kills another with a sedate, deliberate mind, and formed design," whereas implied malice "exists where a defendant lacks the deliberate intent to kill, but the circumstances of the defendant's actions are so harmful that the law punishes the act as though malice did in fact exist." *Watson-Scott v. Commonwealth*, 835 S.E.2d 902, 904 (Va. 2019) (internal quotation marks omitted). "Unlike express malice, implied malice does not require that a defendant have a deliberate intent to kill." *Id.* at 905. Thus, under Virginia law, it is possible to commit second-degree murder with a mens rea of extreme recklessness or a depraved heart.

Nevertheless, as the First Circuit concluded with respect to Puerto Rico second-degree murder in *Baez-Martinez*, 950 F.3d at 127, Virginia second-degree murder is categorically a crime of violence. Because Virginia requires proof of "volitional action" to establish malice, *Flanders*, 838 S.E.2d at 61, second-degree murder under Va. Code § 18.2-32 "requires more than ordinary recklessness," *Baez-Martinez*, 950 F.3d at 125. Indeed, Virginia law contemplates "a species of reckless behavior so willful and wanton, so heedless of foreseeable consequences, and so indifferent to the value of human life that it supplies the element of malice."

Watson-Scott, 835 S.E.2d at 904 (internal quotation marks omitted). Such extreme recklessness is highly culpable conduct. *Cf. Tison v. Arizona*, 481 U.S. 137, 157 (1987) (holding that "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state"). Thus, a defendant who engages in "an intentional 'course of wrongful conduct likely to cause death or great bodily harm,'" *Watson-Scott*, 835 S.E.2d at 905 (quoting *Essex*, 322 S.E.2d at 220), has necessarily "direct[ed] his action at, or target[ed], another individual," *Borden*, 141 S. Ct. at 1825.

In any event, even if the Court determines that Va. Code § 18.2-32 does not satisfy the force clause, Count 34 remains a valid predicate under § 924(c)(3)(A) because of VICAR's purpose requirement. *See infra* Part III. As discussed above, a VICAR offense based on a violation of state law is a force-clause crime of violence if either the federal offense or the state crime contains as an element the use, attempted use, or threatened use of physical force. *See Keene*, 955 F.3d at 398–99; *see also In re Thomas*, 988 F.3d at 791. Because a conviction for VICAR murder requires, in addition to the mens rea required for second-degree murder, proof that the defendant acted for the purpose of increasing or maintaining his position in the criminal enterprise, VICAR's heightened mens rea requirement

ensures that the defendant's conduct is "opposed to or directed at another." *Borden*, 141 S. Ct. at 1827.

At minimum, VICAR murder includes as an element the use, attempted use, or threatened use of force. Therefore, VICAR murder, based on a violation of Va. Code § 18.2-32, is a crime of violence under § 924(c)(3)(A).

III. Both VICAR offenses at issue here remain force-clause crimes of violence after *Borden* because VICAR requires that the defendant act with purpose.

The defendant asserts that VICAR assault with a dangerous weapon and VICAR murder are not categorically crimes of violence because they can be committed with a mens rea of recklessness and extreme recklessness, respectively. Def. Br. 24–36. After the Supreme Court's decision in *Borden*, he maintains, neither recklessness nor extreme recklessness is sufficient to establish the requisite use of force under § 924(c)(3)(A).

The defendant is incorrect, however, because the VICAR statute carries a heightened mens rea element: the defendant must commit the specified crime for the purpose of increasing or maintaining his position (or the position of another) in the criminal enterprise. *See Keene*, 955 F.3d at 394; *United States v. Zelaya*, 908 F.3d 920, 926–27 (4th Cir. 2018); *accord United States v. Concepcion*, 983 F.2d 369, 381 (2d Cir. 1992) (analyzing the VICAR purpose element at length). This heightened mens rea requirement applies to all of the offenses enumerated in

§ 1959(a). *See United States v. Roof*, — F.4th —, 2021 WL 3746805, at *62 (4th Cir. Aug. 25, 2021) ("[The] mens rea elements [of the statute in question] cannot be limited to their individual clauses." (quoting *United States v. Runyon*, 994 F.3d 192, 204 (4th Cir. 2021))). The purpose requirement in § 1959(a) eliminates the possibility that a VICAR crime could be committed recklessly.

To be sure, the government need not show that such a purpose was the defendant's "dominant purpose" in committing the crime. *United States v. Chavez*, 894 F.3d 593, 603 (4th Cir. 2018). And the government may rely on evidence of the defendant's conduct after committing a violent crime to prove that the defendant acted with the requisite purpose. *See Zelaya*, 908 F.3d at 927. However, the defendant must have the purpose to increase or maintain his position in the enterprise, which precludes a recklessness mens rea, before committing the crime. Therefore, VICAR assault with a dangerous weapon and VICAR murder categorically include as an element the use, attempted use, or threatened use of physical force.

The Supreme Court first considered the mens rea required for an offense to qualify as a crime of violence in *Leocal v. Ashcroft*, 543 U.S. 1 (2004). There, the Supreme Court held that "state DUI offenses … , which either do not have a *mens rea* component or require only a showing of negligence in the operation of a vehicle" do not qualify as crimes of violence under 18 U.S.C. § 16. *Id.* at 6. The

Supreme Court explained that "[t]he key phrase in § 16(a)—the 'use … of physical force against the person or property of another'—most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *Id.* at 9. The Supreme Court left open "the question whether a state or federal offense that requires proof of the *reckless* use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Id.* at 13.

Subsequently, the Supreme Court held that driving under the influence of alcohol is not a "violent felony" under ACCA's residual clause. *Larry Begay v. United States*, 553 U.S. 137, 148 (2008), *abrogated by Samuel Johnson v. United States*, 576 U.S. 591, 604 (2015). The Court reasoned that DUI offenses "typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." *Id.* at 145.

Next, in *Castleman*, the Supreme Court held that a misdemeanor conviction for intentionally or knowingly causing bodily injury to another qualified as "a misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). 572 U.S. at 173. The Court reasoned that "the knowing or intentional application of force is a 'use' of force." *Id.* at 170. And in *Voisine v. United States*, 136 S. Ct. 2272 (2016), the Supreme Court held that a misdemeanor conviction for recklessly

assaulting a domestic relation also constitutes a "misdemeanor crime of domestic violence" under § 922(g)(9). *Id.* at 2282. The Court reasoned that "nothing in *Leocal*" suggested "that 'use' marks a dividing line between reckless and knowing conduct." *Id.* at 2279. However, "[l]ike *Leocal*," the Court's decision in *Voisine* did "not resolve whether § 16 includes reckless behavior." *Id.* at 2280 n.4.

Most recently, in *Borden*, the Supreme Court resolved the issue left open in *Leocal* and *Voisine*. A plurality of the Supreme Court held that "[o]ffenses with a *mens rea* of recklessness do not qualify as violent felonies under ACCA" for two reasons. 141 S. Ct. at 1834. First, the plurality examined the text of ACCA's force clause, which defines a "violent felony" as a crime that "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i). The plurality explained that "[t]he phrase 'against another,' when modifying the 'use of force,' demands that the perpetrator direct his action at, or target, another individual." *Borden*, 141 S. Ct. at 1825. Because reckless conduct "is not opposed to or directed at another," the plurality reasoned, it "does not come within the elements clause." *Id.* at 1827. The plurality determined that "[t]he 'against' phrase [] sets out a *mens rea* requirement—of purposeful or knowing conduct." *Id.* at 1828.

Second, the plurality explained that "the classification of reckless crimes as 'violent felonies'" would not "comport with ACCA's purpose." *Id.* at 1830.

Whereas "[a]n offender who has repeatedly committed 'purposeful, violent, and aggressive' crimes poses an uncommon danger of 'us[ing a] gun deliberately to harm a victim,'" the plurality reasoned, the same is not true "of someone convicted of a crime, like a DUI offense, revealing only a 'degree of callousness toward risk.'" *Id.* (quoting *Larry Begay*, 533 U.S. at 145–46). The plurality concluded that offenses requiring only recklessness "are not the stuff of armed career criminals." *Id.* at 1834.

Borden does not, however, call into question the validity of the defendant's convictions here. Unlike the Tennessee reckless aggravated assault statute at issue in *Borden*, VICAR offenses require a heightened mens rea. The VICAR statute provides that:

> Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, *or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity*, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires to do so, shall be punished ….

18 U.S.C. § 1959(a) (emphasis added).[6] Likewise, to establish a violation of the VICAR statute, the government must prove:

> (1) the existence of a RICO enterprise; (2) that the enterprise was engaged in racketeering activity; (3) that the defendant "had a position in the enterprise;" (4) that the defendant committed one of the crimes specified in the VICAR statute … ; and (5) that the defendant's purpose was "to maintain or increase his position in the enterprise."

Keene, 955 F.3d at 394 (quoting *Zelaya*, 908 F.3d at 926–27). Thus, for every VICAR crime, the government must establish either that the defendant acted intentionally (because he committed the VICAR offense for money) or that the defendant acted with the purpose of maintaining or increasing his position in the criminal enterprise. The government satisfies the second showing 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." *Zelaya*, 908 F.3d at 927 (quoting *United States v. Fiel*, 35 F.3d 997, 1004 (4th Cir. 1994)).

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[6] The government can prove a VICAR offense based on evidence that the defendant committed an enumerated crime for the purpose of maintaining or increasing his position or someone else's position in the criminal enterprise. *See* § 1959(a) (prohibiting conduct engaged in "for the purpose of gaining entrance to or maintaining or increasing *position* in an enterprise engaged in racketeering activity" (emphasis added)). However, for ease of reference, this brief describes the heightened mens rea requirement with respect to a defendant's purpose of maintaining or increasing his own position in the enterprise.

Consequently, a VICAR conviction contains the necessary mens rea to constitute a crime of violence because the purpose requirement ensures the "volitional conduct" contemplated by *Borden*. 141 S. Ct. at 1826. *Borden* recognized that ACCA's force clause "covers purposeful and knowing acts," 141 S. Ct. at 1826, because a person acting with purpose or knowledge has "consciously deployed … force … at another person," *id.* at 1827. To be convicted of a VICAR offense, a person necessarily must have "consciously directed" his conduct against another for the purpose of increasing or maintaining his position in the criminal enterprise. *Id.* at 1826.

In other words, the purpose requirement is a form of specific intent; a person cannot inadvertently commit a VICAR offense. *See, e.g.*, *United States v. Walton*, No. 1:16-cr-145 (TWT) (JKL), 2018 WL 7021860, at *3 (N.D. Ga. Nov. 5, 2018) ("It is difficult to conceive of a situation where a person could kill with a motive to aid a racketeering organization but without the intentional or active use of physical force."), *report and recommendation adopted*, No. 1:16-cr-145 (TWT), 2019 WL 188432 (N.D. Ga. Jan. 14, 2019). As this Court has previously held, a specific-intent requirement may be sufficient to convert an offense into a crime of violence even if it would not otherwise qualify. *See, e.g.*, *Townsend*, 886 F.3d at 445 (holding that North Carolina assault with a deadly weapon with intent to kill and inflicting serious injury is categorically a violent felony under ACCA's force

clause because the offense required proof of the defendant's specific intent "to kill by his violent act"). Thus, VICAR offenses do not implicate *Borden*'s concern that a person who merely "pay[s] insufficient attention to the potential application of force" lacks the mens rea to commit a crime of violence. 141 S. Ct. at 1827.

The purpose requirement also ensures that classifying VICAR crimes as crimes of violence furthers the goals of § 924(c). *Cf. id.* at 1825 (expressing concern that "[t]he treatment of reckless offenses as 'violent felonies' would impose large sentencing enhancements on individuals … far afield from the 'armed career criminals' ACCA addresses"). In broad terms, when Congress enacted § 924(c), it sought "to persuade the man who is tempted to commit a Federal felony to leave his gun at home." *Muscarello v. United States*, 524 U.S. 125, 132 (1998) (quoting 114 Cong. Rec. 22231 (1968) (Rep. Poff)); *see United States v. Camps*, 32 F.3d 102, 107 n.6 (4th Cir. 1994) (same). When committed in exchange for money or for the purpose of increasing or maintaining one's position in a criminal enterprise, crimes like assault with a deadly weapon and murder become significantly more dangerous if a gun is involved. Classifying VICAR crimes as force-clause crimes of violence furthers the purpose of § 924(c) by discouraging the use of a firearm when a person commits a violent crime in aid of racketeering.

Based on the framework described above, both of the defendant's VICAR offenses qualify as force-clause crimes of violence after *Borden*.

A. VICAR assault with a dangerous weapon carries a heightened mens rea requirement.

VICAR assault with a dangerous weapon remains a crime of violence under § 924(c)(3)(A) after *Borden*. Consistent with this Court's decision in *Bryant*, the federal generic offense of assault with a dangerous weapon is a force-clause crime of violence because the dangerous-weapon element requires the use, attempted use, or threatened use of physical force. 949 F.3d at 180–82. But even if the Court were to hold that the federal generic offense of assault with a dangerous weapon can be committed with a mens rea of ordinary recklessness, the VICAR offense is still a crime of violence because, in addition to the mens rea required for assault, the government must prove that the defendant acted intentionally (in exchange for money) or for the purpose of increasing or maintaining his position in the enterprise.

This Court has previously held that the heightened mens rea requirements in other federal statutes establish that those offenses categorically involve the use of physical force against another. For example, in *Allred*, this Court considered whether the defendant's prior conviction for retaliation against a witness, in violation of 18 U.S.C. § 1513(b)(1), qualified as a violent felony under ACCA's force clause. 942 F.3d at 652. Applying the modified categorical approach, the

Court determined that the defendant had been convicted of retaliation causing bodily injury to another. *Id.* Turning to the crime-of-violence inquiry, the Court observed that § 1513(b)(1) contained two "heightened mens rea requirements:" the jury had to find that the defendant "'*knowingly* engage[d]' in conduct with the specific '*intent* to retaliate against' a witness and thereby 'cause[d] bodily injury' to another person." *Id.* at 654 (quoting § 1513(b)(1)). Under the statute, "the whole point of a defendant's intentional misconduct was to retaliate against someone for his or her participation as 'a witness or party at an official proceeding.'" *Id.* (quoting § 1513(b)(1)). "[I]n realistic terms," the Court reasoned, "one would hardly go to the trouble of knowingly retaliating in such a manner that causes serious bodily injury to another without knowing or intending to inflict upon that person far more than a mere touch or scratch." *Id.* at 655. The Court concluded that the defendant's "conviction under § 1513(b)(1), which requires knowing conduct that causes bodily injury to another, categorically involves the 'use' of 'violent force' sufficient to bring it within ACCA's elements clause." *Id.*

More recently, in *United States v. Runyon*, 994 F.3d 192, 203 (4th Cir. 2021), the Court considered whether conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958(a), is a crime of violence under § 924(c)(3)(A). Applying the modified categorical approach again, the Court determined that the

offense of conviction was "conspiracy to use facilities of commerce with the intent that a murder be committed for hire where death results." *Id.* at 202–03. Turning to the crime-of-violence inquiry, the Court explained that although "conspiracy alone does not necessarily implicate the use of force, conspiracy in the context of the § 1958 offense at issue is different because it has heightened mens rea elements, as well as the element that 'death results.'" *Id.* at 203 (citation omitted). The Court elaborated that the conspiracy had "two heightened mens rea elements: (1) the intent to join the conspiracy, and (2) the specific intent that a murder be committed for hire." *Id.* (citations omitted). Given these elements, the Court reasoned that there was "no 'realistic probability' of the government prosecuting a defendant for entering into a conspiracy with the specific intent that a murder be committed for hire and for a death resulting from that conspiracy while that death was somehow only accidentally or negligently caused." *Id.* (quoting *Allred*, 942 F.3d at 648). Further, the Court explained that the defendant's "*specific intent* to bring about the death of the conspiracy's victim … ensure[d] that the victim's death was necessarily the result of a *use* of physical force and not merely from negligence or accident." *Id.* at 204. The Court concluded that "a conspiracy to commit murder for hire where death results necessarily involves the 'use of physical force.'" *Id.* at 203.

In the same way, here, the VICAR statute imposes a heightened mens rea requirement: "that the defendant's purpose was 'to maintain or increase his position in the enterprise.'" *Keene*, 955 F.3d at 394 (quoting *Zelaya*, 908 F.3d at 927). Moreover, § 1959(a) requires the government to prove the "purpose" element in addition to the mens rea required for the enumerated crime (here, assault with a dangerous weapon). *See, e.g.*, *United States v. Smith*, 823 F. App'x 34, 37 (2d Cir. 2020) (noting that § 1959(a) "requires not only that [the defendant] possessed the mens rea for murder, but also that he acted with the general purpose of maintaining or increasing his status within the gang"), *cert. denied sub nom. Lopez v. United States*, No. 20-7849, 2021 WL 2302064 (U.S. June 7, 2021); *United States v. Slocum*, 486 F. Supp. 2d 1104, 1118 n.9 (C.D. Cal. 2007) (explaining that VICAR's requirement that "the defendant committed the crime 'for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity' … is in addition to and distinguishable from the intent to kill required for the underlying murder charge" (quoting § 1959(a))). In other words, to sustain a VICAR conviction, the government must always prove that the defendant acted intentionally (in exchange for money) or for the purpose of increasing or maintaining his position in the enterprise, regardless of the mens rea required for the underlying crime.

As in *Allred* and *Runyon*, § 1959(a)'s heightened mens rea requirement confirms that the minimum conduct proscribed by VICAR assault with a dangerous weapon will involve more than the reckless or negligent application of force. The chief function of VICAR is to prohibit crimes committed "for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity." § 1959(a). And the "dangerous weapon" element of VICAR assault with a dangerous weapon ensures at least the threat of physical force is present. It is 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." *Allred*, 942 F.3d at 655. In this way, VICAR assault with a dangerous weapon necessarily requires that the defendant "direct[ed] his action at, or target[ed], another individual." *Borden*, 141 S. Ct. at 1825.

B. VICAR murder carries a heightened mens rea requirement.

VICAR murder also remains a crime of violence under § 924(c)(3)(A) after *Borden*. Consistent with this Court's decision in *Irby*, the federal generic offense of second-degree murder is a force-clause crime of violence because "one cannot unlawfully kill another human being without a use of physical force capable of causing physical pain or injury to another." 858 F.3d at 238. But even if the Court

were to hold that the federal generic offense of second-degree murder does not satisfy the force clause, the VICAR offense is still a crime of violence because, in addition to the mens rea required for murder, the government must prove that the defendant acted intentionally (in exchange for money) or for the purpose of increasing or maintaining his position in the enterprise.

As described above, this Court has repeatedly held that other federal statutes with heightened mens rea requirements are categorically crimes of violence. *See Runyon*, 994 F.3d at 203 (holding that conspiracy to commit murder for hire, in violation of 18 U.S.C. § 1958(a), is a crime of violence under § 924(c)(3)(A) because the offense had "two heightened mens rea elements: (1) the intent to join the conspiracy, and (2) the specific intent that a murder be committed for hire" (citations omitted)); *Allred*, 942 F.3d at 654 (holding that retaliation against a witness causing bodily injury, in violation of 18 U.S.C. § 1513(b)(1), qualified as a violent felony under ACCA's force clause because the jury had to find that the defendant "'*knowingly* engage[d]' in conduct with the specific '*intent* to retaliate against' a witness and thereby 'cause[d] bodily injury' to another person" (quoting § 1513(b)(1)).

Likewise, the VICAR statute imposes a heightened mens rea requirement: "that the defendant's purpose was 'to maintain or increase his position in the enterprise.'" *Keene*, 955 F.3d at 394 (quoting *Zelaya*, 908 F.3d at 927). To

establish a violation of § 1959(a), the government must prove the "purpose" element in addition to the mens rea required for second-degree murder. *See, e.g.*, *Smith*, 823 F. App'x at 37; *Slocum*, 486 F. Supp. 2d at 1118 n.9. Like the heightened mens rea requirements in *Allred* and *Runyon*, VICAR's purpose element ensures that a conviction for VICAR murder necessarily contains as an element the use, attempted use, or threated use of physical force.

Second-degree murder "requires the use of force 'capable of causing physical pain or injury to another person.'" *Irby*, 858 F.3d at 236. A person who is acting for the purpose of maintaining or increasing his position in a criminal enterprise "would hardly go to the trouble" of "unlawful[ly] killing [] a human being with malice aforethought," 18 U.S.C. § 1111(a), "without knowing or intending to inflict upon that person far more than a mere touch or scratch," *Allred*, 942 F.3d at 655. Stated differently, there is "no 'realistic probability' of the government prosecuting a defendant" for committing murder with the specific intent of increasing or maintaining his position in a criminal enterprise "while that death was somehow only accidentally or negligently caused." *Runyon*, 994 F.3d at 203 (quoting *Allred*, 942 F.3d at 648); *cf. Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (noting that "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply legal imagination to the state offense" (internal quotation marks omitted)). Thus, VICAR murder necessarily requires that the

defendant "direct[ed] his action at, or target[ed], another individual." *Borden*, 141 S. Ct. at 1825.

Conclusion

VICAR assault with a dangerous weapon, based on a violation of Va. Code § 18.2-51, and VICAR murder, based on a violation of Va. Code § 18.2-32, are valid predicate crimes of violence under § 924(c)(3)(A). Nothing in *Borden* disturbs that conclusion. For the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

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/s/

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Statement Regarding Oral Argument

The United States respectfully suggests that oral argument would aid the decisional process in this case. The Court has not yet had the opportunity to address the effect of *Borden* on VICAR assault with a dangerous weapon and VICAR murder. Binding precedent resolving the issues presented in this appeal would clarify the doctrine for other cases involving the force clause.

Certificate of Compliance

I certify that this brief was written using 14-point Times New Roman typeface and Microsoft Word 2016.

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I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions.

/s/

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