No. 20-6812

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARTIN MANLEY,

Appellant.

On appeal from the U.S. District Court for the Eastern District of Virginia, at Newport News (Smith, J.) (4:08-cr-00144-RBS-3; 4:20-cv-00022-RBS)

PETITION FOR REHEARING EN BANC

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STATEMENT REGARDING *EN BANC* HEARING

In counsel's professional judgment, the panel's decision in this case presents two questions that merit *en banc* consideration under Federal Rule of Appellate Procedure 35:

1. The panel's holding that crimes requiring a *mens rea* of "extreme" recklessness satisfy the elements clause of 18 U.S.C. § 924(c)(3)(A) presents a question of exceptional importance.

2. The panel's holding that a specific intent *mens rea* can be supplied by a predicate Virginia crime charged in the indictment presents a question of exceptional importance and highlights an apparent conflict between this Court's decisions in *United States v. Simmons*, 11 F.4th 239 (4th Cir. 2021), and *United States v. Keene*, 955 F.3d 391 (4th Cir. 2020), and a conflict with decisions of the Supreme Court and other circuits. Review is necessary to secure and maintain uniformity of this Court's decisions.

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases before this Court.

INTRODUCTION

The panel's decision resolves two difficult and important issues that merit consideration for potential *en banc* review.

First, the panel decided the issue the Supreme Court left open in *Borden v. United States*, 141 S. Ct. 1817, 1825 n.4 (2021): whether crimes that can be committed through extreme recklessness necessarily involve a "use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A). The panel concluded that extreme recklessness "is closer in culpability to 'knowledge' than it is to 'recklessness,'" and therefore satisfied the force clause of § 924(c)(3)(A). *United States v. Manley*, No. 20-6812, slip op. at 12. We respectfully submit that the reasoning of both the four-Justice plurality and Justice Thomas's concurrence in *Borden* strongly suggest a different answer. Certainly courts consider extreme recklessness as closer *in culpability* to knowledge than to ordinary recklessness, on the negligence-to-knowledge continuum. But the specific question under 18 U.S.C. § 924(c)(3)(A) is whether extreme recklessness necessarily involves the kind of individual *targeting* that qualifies as a "use" of force "against" another. There is a strong argument that it does not.

This issue affects a very large number of cases, not only under § 924(c) but also the identical or near-identical elements clauses in the Armed Career Criminals Act ("ACCA"), 18 U.S.C. § 924(e), and 18 U.S.C. § 16, which is frequently relevant

to federal deportation proceedings because of 8 U.S.C. § 1101(a)(43)(F). And given the possibility that this Court *en banc* or the Supreme Court may someday reach a different conclusion than the panel's, there would be good reasons to address the issue now. This Court is only too familiar with the jurisprudential chaos that results when the substantive elements of § 924(c) are reinterpreted in a manner more favorable to criminal defendants. The passage of time, and additional guilty pleas and convictions, will only make correcting an erroneous interpretation more difficult.

Second, the panel's decision highlights conflict both within this circuit and across circuits about the role that state predicate offenses play under the Violent Crimes In Aid of Racketeering ("VICAR") and Racketeer Influenced and Corrupt Organizations ("RICO") statutes. The panel held that one of Mr. Manley's counts satisfied the elements clause because a Virginia specific intent crime was alleged in the indictment to satisfy VICAR's "in violation of the laws of any State or the United States" element. 18 U.S.C. § 1959(a). As the panel noted, that conclusion is supported by this Court's decision in *United States v. Keene*, 955 F.3d 391 (4th Cir. 2020), which held that a VICAR conviction requires proof of the elements of a state predicate crime. But it is in great tension with this Court's holding in *United States v. Simmons*, 11 F.4th 239 (4th Cir. 2021), that the specific racketeering act charged (there, Virginia murder) was not itself an *element* of aggravated RICO conspiracy;

the murder was the *means* by which the indivisible racketeering-act element was satisfied. 11 F.4th at 258–60. The least culpable conduct analysis therefore had to consider *all* offenses that could have satisfied that element. *Id*.

The panel in this case effectively held that VICAR is divisible, for purposes of the modified categorical approach, into a nearly infinite number of distinct crimes based on the state or federal predicates charged. That is an even more extreme version of the interpretation that the *Simmons* panel held to be implausible under RICO, VICAR's companion statute. It also is inconsistent with the Supreme Court's holding in *Descamps v. United States*, 570 U.S. 254 (2013), that elements are not divisible absent a list of qualifying predicates. And there appears to be a robust circuit split on this issue, considering RICO and VICAR precedents together. This is a question of exceptional importance, and the clarity and stability of the law would greatly benefit from this Court's *en banc* consideration.

STATEMENT OF FACTS

Mr. Manley pled guilty to two crimes that implicate § 924(c)(3)(A)'s definition of a crime of violence: discharging a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c)(1) (Count 25), and use and discharge of a firearm in relation to a crime of violence resulting in death in violation of §§ 924(c)(1) and (j) (Count 35).

For Count 25, the predicate crime of violence was "Assault with a Dangerous Weapon in Aid of Racketeering Activity" in violation of VICAR, 18 U.S.C. § 1959(a)(3). To satisfy VICAR's "in violation of the laws of any State or the United States" requirement, the indictment also alleged a violation of Va. Code Ann. § 18.2-51. JA 58-60. The panel held that § 18.2-51 is a specific intent crime. Slip op. 8–9.

For count 35, the predicate crime of violence was "Murder in Aid of Racketeering Activity" in violation of VICAR, § 1959(a)(1), and the indictment also alleged a violation of Virginia's murder statute, Va. Code Ann. § 18.2-32. JA 72–74. The panel held that the *mens rea* for Virginia second degree murder "amounts to what the parties agree is 'extreme recklessness.'" Slip op. 11.

REASONS FOR GRANTING REHEARING *EN BANC*

I. REHEARING *EN BANC* IS WARRANTED TO CONSIDER WHETHER EXTREME RECKLESSNESS CRIMES SATISFY THE § 924(c)(3)(A) ELEMENTS CLAUSE

Counsel respectfully believes that rehearing *en banc* would be warranted to consider whether extreme recklessness crimes "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. § 924(c)(3)(A).

The Supreme Court held in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that crimes that can be committed negligently do not involve the necessary "use" or "threat." Last year, a fractured Court extended that holding to recklessness crimes in *Borden.*

Justice Kagan's plurality opinion began by explaining the traditional hierarchy of culpable mental states in criminal law, with "purpose and knowledge" at the top. *Borden*, 141 S. Ct. at 1823. "A person acts purposefully when he 'consciously desires' a particular result," and "knowingly when 'he is aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Id.* (citation omitted). The plurality explained that because a person who knowingly injures another has "consciously deployed [force] at another person," the law regards him as intending the harmful result even if that result was not his specific *purpose*. *Id.* at 1827 (citation omitted). By contrast, "[r]ecklessness and negligence are less culpable mental states because they instead involve insufficient concern with a risk of injury." *Id.* at 1824. A reckless violator "'consciously disregards a substantial and unjustifiable risk' attached to his conduct, in 'gross deviation' from accepted standards." *Id.* (quoting Model Penal Code § 2.02(2)(c)). But he does not *intend* the harm that may result.

The *Borden* plurality explained that the phrase "use of physical force" in the elements clause indicates a "'volitional' or 'active' employment of force." *Id.* at 1825 (citation omitted). And because "against another" modifies "use of physical force" in that volitional sense, it "demands that the perpetrator direct his action at, or target, another individual." *Id*. The full elements clause thus demands an "oppositional, or targeted definition" that "covers purposeful and knowing acts, but

excludes reckless conduct," which is "not aimed in [the] prescribed manner." *Id.* The statute is "best understood to [require] not only a substantial degree of force, but also a purposeful or knowing mental state—a deliberate choice of wreaking harm on another, rather than mere indifference to risk." *Id.* at 1827 (citations omitted).

The plurality repeatedly pointed to reckless driving to illustrate conduct that *does not* satisfy the elements clause. A driver who runs a red light and hits an unseen pedestrian has "consciously disregarded a real risk," but "has not directed force at another." *Id.* And because "[the driver's] conduct is not opposed to or directed at another," he does not "use[] force 'against' another person in the targeted way that [the statute] requires." *Id.*

Justice Thomas concurred in the judgment, concluding that "a crime that can be committed through mere recklessness does not have as an element the use of physical force because that phrase has a well-understood meaning applying only to intentional acts designed to cause harm." *Id.* at 1835 (Thomas, J., concurring in the judgment) (internal quotation marks omitted).

The *Borden* plurality explicitly reserved the question, not presented in that case, of whether extreme recklessness or a "depraved heart" mental state would satisfy the ACCA's "use of physical force" clause. *Id.* at 1825 n.4. But both the plurality's reasoning and Justice Thomas's suggest that the statutory language

requires a conscious targeting of force that could only be satisfied by purposeful or knowing conduct, and not by any form of recklessness.

Extreme recklessness has been described in many ways, all of which boil down to "extreme indifference to the value of human life." Model Penal Code § 210.2. As the panel explained, Virginia precedents require "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." Slip op. 13 (citation omitted). But the "malice" supplied in an extreme recklessness case is "constructive," not actual. *Pugh v. Commonwealth*, 292 S.E.2d 339, 341 (Va. 1982) (quoting 1 *Wharton's Criminal Law and Procedure* § 245, at 529 (1957)). Extreme recklessness is still recklessness, requiring a risk "far less than [the] substantial certainty" required for knowledge. Wayne R. LaFave & Austin W. Scott, 2 *Substantive Criminal Law* § 14.4(a), Westlaw (3d ed. database updated Oct. 2022) (footnote omitted).

That risk also need not be directed against any known person or group. It is well established that reckless and intoxicated driving can count as extremely reckless behavior, including in second degree murder cases.[1] In *United States v. Fleming*, for

[1] *See, e.g.*, *United States v. Lemus-Gonzalez*, 563 F.3d 88, 93 (5th Cir. 2009) (finding murder sentencing guidelines appropriate for intoxicated driver who transported aliens without seatbelts at a high rate of speed); *State v. Barstad*, 970 P.2d 324, 326 (Wash. Ct. App. 1999) (affirming murder conviction for intoxicated driver who sped

example, this Court held that the jury permissibly inferred "depraved disregard for human life" when the drunk defendant wove in and out of oncoming traffic at excessive speeds on the George Washington Parkway, "lost control of [his car] on a sharp curve," and killed another motorist traveling in the opposite direction. 739 F.2d 945, 947–48 (4th Cir. 1984). This Court upheld the defendant's murder conviction, explaining that "[t]o support a conviction for murder, the government need only have proved that defendant intended to operate his car in the manner in which he did with a heart that was without regard for the life and safety of others." *Id.* at 948. Mr. Fleming's behavior evidenced a depraved disregard for human life, but he did not intend to crash or knowingly target an application of force against anyone.

Extreme recklessness instructions essentially permit juries to make an *ad hoc* value judgment that the defendant's extremely reckless behavior was so morally culpable that it should be punished as if it were knowing or intentional conduct. We

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through red light at busy intersection); *State v. Braden*, 867 S.W.2d 750, 753 (Tenn. Crim. App. 1993) (affirming vehicular homicide convictions for intoxicated driver who took a blind curve at over eighty miles per hour); *Allen v. State*, 611 So.2d 1188, 1189–90 (Ala. Crim. App. 1992) (affirming murder conviction for intoxicated driver who swerved into oncoming traffic); *State v. Woodall*, 744 P.2d 732, 736 (Ariz. Ct. App. 1987) (intoxicated driver who crossed the center line while speeding); *Pears v. State*, 672 P.2d 903, 909 (Alaska App. 1983) (affirming murder conviction for intoxicated driver who ran stop signs, yield signs, and traffic lights), *remanded on other grounds*, 698 P.2d 1198 (Alaska 1985).

thus have no quarrel with the panel's observation that extreme recklessness "is closer in *culpability* to 'knowledge' than it is to 'recklessness.'" Slip op. 12 (emphasis added). That is why depraved heart murder is punished as murder, not manslaughter. But a sense of greater moral *culpability* does not necessarily supply what the plurality and Justice Thomas thought was missing in *Borden*: force meaningfully *targeted* against another.

The panel correctly notes that the prior circuit split on this issue was resolved (for now) when the Ninth Circuit recently granted *en banc* reconsideration and ruled (8-3) in a manner consistent with the panel's decision here. *See United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en banc), *cert. denied*, ___ S. Ct. ___ (2022). The First and Eleventh Circuits have issued similar decisions. *See Alvarado-Linares v. United States*, 44 F.4th 1334, 1343–44 (11th Cir. 2022); *United States v. Báez-Martínez*, 950 F.3d 119, 125–27 (1st Cir. 2020). But none of those opinions explains why extreme recklessness is not just more *culpable* than ordinary recklessness but also more *targeted* in a way that would satisfy the concerns of the *Borden* plurality and Justice Thomas.[2]

[2] *Begay* further erred by relying on the firearms context of § 924(c). The statute requires (1) using or carrying a firearm (2) during and in relation to a predicate offense that constitutes a crime of violence. The elements clause focuses solely on the predicate offense, not § 924(c) itself, and it has to be interpreted consistently with the other elements clauses in the ACCA and § 16. The Ninth Circuit also erred by relying on the fact that most reckless driving is charged as manslaughter. *United*

This is an issue of exceptional importance. Extreme recklessness crimes are common and, as this Court knows only too well, so are federal prosecutions that turn on the correct application of the various elements clauses. And when the substantive scope of § 924(c) is clarified in favor of criminal defendants, every defendant who was convicted under the prior interpretation has a plausible innocence claim that has to be taken seriously in 28 U.S.C. § 2255 proceedings. *Leocal* and *Borden* already have produced many such cases. Twenty-five years ago, *Bailey v. United States*, 516 U.S. 137 (1995), and *Bousley v. United States*, 523 U.S. 614 (1998), produced many more. The panel's decision in this case thoughtfully addresses a difficult interpretive question. But if this Court, or the Supreme Court, may ultimately reach a different conclusion, there would be great merit in addressing the issue now rather than years from now.

II. REHEARING *EN BANC* SHOULD BE GRANTED TO CLARIFY WHETHER STATE PREDICATE CRIMES ARE ELEMENTS OF VICAR AND RICO CHARGES

The panel held that Count 25 satisfies § 924(c)(3)(A) because the Virginia crime charged as a predicate for VICAR's "in violation of the laws of any State or the United States" element, *see* 18 U.S.C. § 1959(a), "constitutes an element of the VICAR offense" and imports a specific intent requirement. Slip op. 8. That holding

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States v. Taylor makes clear that how an offense is usually committed is irrelevant to the categorical approach. 142 S. Ct. 2015, 2024–25 (2022).

implicates an exceptionally important apparent conflict both within this Court's precedents and across circuits concerning whether the particular state predicate crimes charged become "elements" of a VICAR or RICO offense.

A. Review Is Warranted To Address Inconsistency Within This Court's Precedents

As the panel noted, its analysis is supported by *Keene*, which held that a conviction under VICAR requires proof that the defendant committed one of the generic crimes listed in § 1959(a) (*e.g.* assault with a deadly weapon) "'in violation of' the state law charged in the indictment." *Keene*, 955 F.3d at 398.

In applying the modified categorical approach to aggravated RICO conspiracy, however, another panel of this Court concluded that the specific state crimes charged as predicate racketeering acts *were not* elements of the RICO offense. *Simmons*, 11 F.4th at 260. As *Simmons* explained, looking to the specific racketeering acts charged "improperly inject[ed] an extra level of divisibility into the crime of the violence analysis." *Id.* Rather, 18 U.S.C. § 1961(1) "lists the *means*—the 'alternative methods'—of committing an aggravated RICO conspiracy, not additional elements for committing that offense," and therefore the categorical approach must "consider the entire class of qualifying racketeering acts, not just the specific ones that Simmons and Mitchell committed in this case." *Id.*

The same reasoning should apply to RICO's companion statute VICAR. *See United States v. Ayala*, 601 F.3d 256, 265–66 (VICAR "complements" RICO by "address[ing] … interrelated problems"). In fact, VICAR's "in violation of the law of any State or the United States" element is even more clearly indivisible than § 1963, because it references no list of possible predicates. In *Descamps*, the Supreme Court considered and rejected the project of "reconceiv[ing]" an element that does not explicitly list alternatives as "an *implied* list" of qualifying acts. 570 U.S. at 271 (citation omitted). "[E]very element of every statute can be imaginatively transformed [to contain] an infinite number of sub-crimes," *id.* at 273-74, but the modified categorical approach simply "has no role to play" where the dispute "does not concern any list of alternative elements," *id.* at 264. *See also, e.g.*, *Mathis v. United States*, 579 U.S. 500, 504–05 (2016).

B. This Court's Intra-Circuit Conflict Mirrors A Deep Multi-Circuit Conflict

The inconsistency within this Court's cases mirrors a broader circuit conflict that merits careful review.

1. Six Other Circuits Appear to Agree with the Panel That VICAR and RICO Crimes Are Divisible by Predicate

Six other circuits appear to treat VICAR and/or RICO crimes as divisible by the predicate racketeering acts charged.

The First Circuit has held, in plain error analysis, that there is "support for finding that aggravated RICO conspiracy is divisible by predicate act for purposes of the modified categorical approach." *United States v. Solis-Vasquez*, 10 F.4th 59 (1st Cir. 2021) (citing *United States v. Nguyen*, 255 F.3d 1335, 1343 (11th Cir. 2001)), *cert. denied*, 142 S. Ct. 833 (2022).

The Second Circuit, like the panel here, has held that "a substantive VICAR offense is a crime of violence when predicated on at least one violent ... racketeering act[]." *United States v. Pastore*, 36 F.4th 423, 429 (2d Cir. 2022) (quoting *United States v. Laurent*, 33 F.4th 63, 88 (2d Cir. 2022)) (alteration omitted). The Second Circuit, unlike *Simmons*, also has looked to the predicate offenses underlying a RICO conviction under § 1962 to determine whether it was a crime of violence. *United States v. Ivezaj*, 568 F.3d 88, 96 (2d Cir. 2009).

The Third Circuit has held that § 1962(c) is divisible by predicate acts. *United States v. Williams*, 898 F.3d 323, 333–34 (3d Cir. 2018).

The Seventh Circuit has stated that the predicate racketeering acts required by §§ 1962(a), (b), and (c) are "elements that must be proven beyond a reasonable doubt and are subject to unanimous jury findings." *Haynes v. United States*, 936 F.3d 683, 691 (7th Cir. 2019) (citing *United States v. Gotti*, 451 F.3d 133, 137 (2d Cir. 2006); *United States v. Maloney*, 71 F.3d 645, 662 (7th Cir. 1995)).

The Tenth Circuit appears to have assumed that a VICAR predicate determines whether the conviction satisfies the categorical approach, without explicitly so holding. *See United States v. Toki*, 23 F.4th 1277, 1279–81 (10th Cir. 2022).

The Eleventh Circuit has explicitly held that the state predicate can be an element of a VICAR conviction. *Alvarado-Linares v. United States*, 44 F.4th 1334, 1343 (11th Cir. 2022).

2. Five Circuits Appear to Agree with the *Simmons* Panel That RICO and VICAR Crimes Are Not Divisible by Predicate

The Fifth Circuit, like *Simmons*, has held that a RICO aggravated conspiracy conviction was not a crime of violence, even though the government argued that the conviction required proof of the elements of a predicate racketeering act punishable by life in prison and the government did in fact prove the elements of murder. *United States v. McClaren*, 13 F.4th 386, 413 (5th Cir. 2021). It also has decided that although a RICO defendant was charged with racketeering acts in violation of a statute passed *after* some of the alleged conduct, there were no retroactivity concerns because the conduct would have been illegal under a *different* state law. *United States v. Vaccaro*, 115 F.3d 1211, 1220–21 & n.6 (5th Cir. 1997). That approach clearly does not view the specific charged predicate as an element of the RICO offense. *See also United States v. Tolliver*, 61 F.3d 1189, 1208–09 (5th Cir. 1995)

(it was not plain error in a VICAR case to instruct the jury only on the elements of generic murder), *vacated on other grounds by Moore v. United States*, 519 U.S. 802 (1996); *United States v. Welch*, 656 F.2d 1039, 1058 (5th Cir. 1981) (RICO conviction survives even if the indictment cited the wrong subpart of the statute).

The Sixth Circuit has held that the categorical approach, as applied to VICAR, requires analyzing the "generic offense of assault with a dangerous weapon, not a specific federal or state law offense." *United States v. Frazier*, 790 Fed. App'x 790 (6th Cir. 2020) (citing *Manners v. United States*, 947 F.3d 377, 380 (6th Cir. 2020)).

The Eighth Circuit has stated that RICO does not "incorporate elements of state crimes." *See United States v. Kehoe*, 310 F.3d 579, 588 (8th Cir. 2002) (citation omitted). Rather, RICO identifies a category of "generic conduct" that counts as a predicate. *Id.*

The Ninth Circuit has "permitted jury instructions using generic federal definitions" under VICAR. *United States v. Adkins*, 883 F.3d 1207, 1210 (9th Cir. 2018) (citing *United States v. Joseph*, 465 Fed. App'x 690, 696 (9th Cir. 2012)). The government could prove VICAR assault "under federal common law" so long as the evidence showed that Hawaii's armed robbery statute was violated. *Joseph*, 465 Fed. App'x at 696.

Finally, in analyzing multiplicity, the D.C. Circuit has rejected the argument that a VICAR indictment "incorporate[s] the definitions of [predicate] D.C. offenses

as an element of the VICAR offense." *See United States v. Mahdi*, 598 F.3d 883, 890 (D.C. Cir. 2010). The court viewed the VICAR element as merely "meant to indicate unlawful conduct," *id.* (quoting *United States v. Diaz*, 176 F.3d 52, 96 (2d Cir. 1999)), implying that unlawfulness, and not the precise crime charged, was the crucial element.

Given the inconsistency among the circuits on this complex question, it would be beneficial for the full Court to examine it now.

CONCLUSION

Appellant requests that the Court grant rehearing en banc.

Respectfully submitted,

November 8, 2022

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CERTIFICATE OF COMPLIANCE

I certify the following that this petition complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because the brief contains 3881 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to Microsoft Word's word count function.

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