No. _____

In The
Supreme Court of the United States

MARTIN JAY MANLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 20-6812

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.

MARTIN JAY MANLEY, a/k/a Buck,
Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Rebecca Beach Smith, Senior District Judge. (4:08-cr-00144-RBS-3; 4:20-cv-00022-RBS)

Argued: September 14, 2022
Decided: October 26, 2022

Before NIEMEYER, DIAZ, and QUATTLEBAUM, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion for the court in Parts I, II, and IV, in which Judge Diaz and Judge Quattlebaum concurred. Judge Niemeyer wrote an opinion in Part III.

ARGUED: Jacob Smith, Holly Chaisson, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Jacqueline Romy Bechara, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee. **ON**

BRIEF: J. Scott Ballenger, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Raj Parekh, Acting United States Attorney, Alexandria, Virginia, Richard D. Cooke, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellee.

NIEMEYER, Circuit Judge, wrote the opinion for the court in Parts I, II, and IV, and wrote an opinion in Part III:

The issue presented in this appeal is whether offenses under 18 U.S.C. § 1959 (violent crimes in aid of racketeering activity, commonly referred to as "VICAR") — in particular, VICAR assault and VICAR murder — must be committed with a sufficiently culpable *mens rea* to amount to "crime[s] of violence," as necessary for conviction under 18 U.S.C. § 924(c). The VICAR statute punishes certain crimes committed in aid of racketeering activity, including (1) assault with a dangerous weapon or resulting in serious bodily injury under state or federal law and (2) murder under state or federal law. *Id.* § 1959(a)(1), (3). While the Supreme Court recently held in *Borden v. United States*, 141 S. Ct. 1817 (2021), that a crime with a *mens rea* of "recklessness" cannot qualify as a "violent felony" under 18 U.S.C. § 924(e), which is materially similar to a "crime of violence" in § 924(c)(3), we hold that the elements of both VICAR assault and VICAR murder in this case include a *mens rea* more culpable than mere recklessness and that the *mens rea* of both VICAR crimes satisfies the *mens rea* element of a "crime of violence" in § 924(c).

Accordingly, we affirm the district court's judgment reaching the same result but for different reasons.

I

Martin Manley, a member of the street gang in Newport News, Virginia, known as the "Dump Squad," was charged in 2009 with counts of racketeering conspiracy, drug conspiracy, conspiracy to interfere with and interference with commerce by robbery, using a firearm during and in relation to a crime of violence, assault with a dangerous weapon in aid of racketeering activity, maiming in aid of racketeering activity, murder in aid of racketeering activity, and using a firearm causing death. Later in 2009, he pleaded guilty to Count 1, charging him with racketeering conspiracy, in violation of 18 U.S.C. § 1962(d); Count 25, charging him with the use of a firearm during and in relation to a crime of violence, in violation of § 924(c); and Count 35, charging him with the use of a firearm during and in relation to a crime of violence causing death, in violation of § 924(c), (j).

Following the Supreme Court's decision in *United States v. Davis*, 139 S. Ct. 2319 (2019), Manley filed a motion under 28 U.S.C. § 2255 to vacate his two convictions for violation of § 924(c) (Counts 25 and 35), contending that the predicate offenses alleged for those violations were no longer "crimes of violence," as defined by § 924(c)(3). *Davis* held that the "residual clause" defining a crime of violence in § 924(c)(3)(B) was unconstitutionally vague but left standing the "elements clause" definition in § 924(c)(3)(A). Manley contended that his § 924(c) convictions relied on *conspiracy* to

engage in racketeering as charged in Count 1, which, he argued, was not a crime of violence because it satisfied only the invalidated residual clause and that therefore his convictions on Counts 25 and 35 were no longer valid.

The district court denied Manley's § 2255 motion, noting that while the residual clause had indeed been held to be unconstitutionally vague, the elements clause "remain[ed] constitutionally valid." Rejecting Manley's contention that his two 924(c) convictions were premised on racketeering conspiracy as charged in Count 1, the court held that the predicate offense for Manley's conviction on Count 25 was "assault with a dangerous weapon in aid of racketeering activity," in violation of 18 U.S.C. § 1959(a)(3), as alleged in Count 24, which remained a crime of violence under the elements clause. It also held that the predicate offense for Manley's conviction on Count 35 was "murder in aid of racketeering activity," in violation of 18 U.S.C. § 1959(a)(1), as alleged in Count 34, which also remained a crime of violence under the elements clause.

While Manley's appeal from the district court's order denying his § 2255 motion was pending, the Supreme Court handed down its decision in *Borden*, which held that offenses that can be committed with a *mens rea* of recklessness are not "violent felonies." 141 S. Ct. at 1821–22, 1825 (plurality opinion); *id.* at 1835 (Thomas, J., concurring). Manley now argues that the predicate offenses for his § 924(c) convictions in both Counts 25 and 35 can be committed with a *mens rea* of recklessness and that therefore they are, by reason of *Borden*, no longer

crimes of violence that can support his convictions under § 924(c).

II

Section 924(c), the offense of which Manley was convicted on both Counts 25 and 35, provides:

> [A]ny person who, during and in relation to any *crime of violence* . . . uses or carries a firearm . . . shall [be punished].

18 U.S.C. § 924(c)(1)(A) (emphasis added). And "crime of violence" is defined in the elements clause as "an offense that is a felony and . . . has as *an element* the use, attempted use, or threatened use of physical force against the person or property of another." *Id.* § 924(c)(3)(A) (emphasis added).

Here, the predicate crime of violence alleged in Count 25 was assault with a dangerous weapon in aid of racketeering activity ("VICAR assault"), in violation of 18 U.S.C. § 1959(a)(3), "as set forth in Count Twenty-four of [the] Indictment." And Count 24 charged Manley with committing VICAR assault by "knowingly, intentionally and unlawfully assault[ing]" a rival gang member "with a dangerous weapon, which resulted in serious bodily injury to [the rival gang member], in violation of Va. Code Ann. § 18.2-51 [unlawful wounding], for the purpose of gaining entrance to and maintaining and increasing position in an Enterprise engaged in racketeering activity." The crime of violence alleged in Count 35 was murder in aid of racketeering activity ("VICAR murder"), in violation of 18 U.S.C. § 1959(a)(1), "as set forth in Count Thirty-four of [the]

Indictment." And Count 34 charged Manley with committing VICAR murder by "knowingly, willfully, and unlawfully caus[ing] the murder of Tony Vaughn in violation of Va. Code Ann. § 18.2-32 [first and second-degree murder], for the purpose of gaining entrance to and maintaining and increasing position in an Enterprise engaged in racketeering activity."

The issue before us is the question of law whether the offenses charged in Counts 24 and 34 — which were incorporated into Counts 25 and 35, purportedly as crimes of violence — required a *mens rea* more culpable than mere recklessness so as to actually qualify as "crime[s] of violence" following *Borden*. We address each crime in order.

A

The offense charged in Count 24 and incorporated into Count 25 purportedly as a "crime of violence" was a violation of VICAR assault (§ 1959(a)(3)), premised on the state offense of unlawful wounding in violation of Virginia Code § 18.2-51. The elements necessary for a conviction of VICAR assault are (1) that there be an "enterprise," as defined in § 1959(b)(2); (2) that the enterprise be engaged in "racketeering activity," as defined in 18 U.S.C. § 1961; (3) that the defendant have committed an assault "with a dangerous weapon" or "resulting in serious bodily injury"; (4) that the assault have violated state or federal law; and (5) that the assault have been committed for a designated pecuniary purpose or "for the purpose of gaining entrance to or maintaining or increasing position in [the] enterprise." 18 U.S.C. § 1959(a)(3);

see also United States v. Zelaya, 908 F.3d 920, 926–27 (4th Cir. 2018); *United States v. Fiel*, 35 F.3d 997, 1003 (4th Cir. 1994). And the minimum elements necessary for proving the state assault offense alleged in Count 24 are that the person (1) "unlawfully" (2) cause a person bodily injury (3) "with the intent to maim, disfigure, disable, or kill." Va. Code Ann. § 18.2-51.

Manley's guilty plea to Count 25, therefore, confessed that each element of the crime alleged in Count 24 was satisfied, and thus those elements may be considered to determine whether the offense qualified as a crime of violence for purposes of § 924(c). Of course, if the *mens rea* element can, as a matter of law, be satisfied with a mental state of recklessness or negligence, the offense is not a crime of violence. *See Borden*, 141 S. Ct. at 1821–22, 25 (plurality opinion) (explaining that offenses with a *mens rea* of ordinary recklessness are not violent felonies); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (holding that offenses with a *mens rea* of negligence are not crimes of violence). But if the elements of a crime "demand[]" that the person have "direct[ed] his action at, or target[ed], another individual," the action is more purposeful and satisfies the *mens rea* requirement necessary for an offense to qualify as a crime of violence. *Borden*, 141 S. Ct. at 1825 (plurality opinion).

We have held specifically that the unlawful wounding offense proscribed by Virginia Code § 18.2-51 meets the criteria for a crime of violence. In *United States v. Rumley*, 952 F.3d 538, 551 (4th Cir. 2020), we concluded that Virginia unlawful wounding was categorically a "violent felony" under 18 U.S.C. § 924(e) — which defines "violent felony"

similarly to the way § 924(c)(3) defines "crime of violence" — because it satisfied the elements clause. We explained, "[N]ot only does the Virginia statute require the causation of bodily injury, . . . it also requires 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.* at 550. And this "specific intent" requirement, combined with the causation of bodily injury, necessarily entailed the use of physical force. *Id.*; *see also Moreno-Osorio v. Garland*, 2 F.4th 245, 253–54 (4th Cir. 2021). Thus, we readily conclude that Virginia unlawful wounding, in violation of § 18.2-51, satisfies the criteria set forth in *Borden* for a crime of violence, as the Virginia statute "demands that the perpetrator direct his action at, or target, another individual," and such a *mens rea* is greater than negligence or recklessness. *Borden*, 141 S. Ct. at 1825 (plurality opinion); *cf. United States v. Townsend*, 886 F.3d 441, 445 (4th Cir. 2018) (noting 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").

Manley argues that we should not consider the elements of the state statute alleged in Count 24 to determine whether the VICAR assault offense is a crime of violence because the predicate crime of violence alleged in Count 25 was VICAR assault, not Virginia assault. But this argument overlooks element (4) of VICAR assault, which requires that the assault be "in violation of the laws of any State or the United States." 18 U.S.C. § 1959(a). To properly charge a VICAR assault, therefore, the

government must identify a specific state or federal law that the defendant violated by engaging in the conduct underpinning the VICAR offense. In this case, that charged offense was a violation of Virginia Code § 18.2-51 (unlawful wounding). And because the Virginia offense constitutes an element of the VICAR offense, it is proper to examine whether a conviction under the Virginia statute would be a crime of violence. *See United States v. Mathis*, 932 F.3d 242, 264–65 (4th Cir. 2019); *see also United States v. Keene*, 955 F.3d 391, 392–93 (4th Cir. 2020).

Presuming that it is appropriate to consider the *mens rea* of the unlawful wounding offense under Virginia Code § 18.2-51, Manley argues that cases from the Virginia Court of Appeals show that convictions under § 18.2-51 are upheld in Virginia based on reckless conduct, thus precluding the crime's qualification as a crime of violence. *See Shimhue v. Commonwealth*, No. 1736-97-2, 1998 WL 345519, at *1 (Va. Ct. App. June 30, 1998) (upholding a conviction for malicious wounding when the defendant twice fired his weapon into the floor of his apartment to frighten a woman, but one bullet traveled through the floor and struck the leg of a neighbor in the apartment below); *David v. Commonwealth*, 340 S.E.2d 576, 577 (Va. Ct. App. 1986) (upholding a conviction for unlawful wounding after the defendant intentionally fired a gun at the cement near where other people were standing and the bullet ricocheted and hit the victim's foot); *Knight v. Commonwealth*, 733 S.E.2d 701, 702–03 (Va. Ct. App. 2012) (upholding a conviction for malicious wounding based on the defendant's traveling at dangerously excessive speeds in a

populated area and causing a multi-car crash). All three cases, however, came to the appellate court under a challenge to the sufficiency of the evidence. *See Shimhue*, 1998 WL 345519, at *1–2; *David*, 340 S.E.2d at 577; *Knight*, 733 S.E.2d at 707–08. And the sufficiency of the evidence was a question for the trier of fact. In its review, therefore, the Virginia Court of Appeals was required to view the evidence in the light most favorable to the Commonwealth. Thus, the court in each case could and did accept that the factfinder inferred that the defendant intended the immediate consequences of his voluntary acts. *See Shimhue*, 1998 WL 345519, at *1; *David*, 340 S.E.2d at 577; *Knight*, 733 S.E.2d at 704, 707–08. The Virginia court's holdings in these cases, however, hardly rejected the *mens rea* required by the explicit text of the statute that the perpetrator act with "the intent to main, disfigure, disable, or kill." Va. Code Ann. § 18.2-51; *see also Rumley*, 952 F.3d at 550 (noting that § 18.2-51 requires "the specific intent to cause severe and permanent injury"). The Supreme Court of Virginia has likewise described Virginia Code § 18.2-51 as requiring proof of "specific intent." *See, e.g.*, *Commonwealth v. Vaughn*, 557 S.E.2d 220, 222 (Va. 2002).

At bottom, we conclude that the VICAR assault offense charged in Count 24 and incorporated into Count 25 purportedly as a crime of violence is indeed a crime of violence, thereby rendering Manley's conviction under Count 25 valid.

B

The offense charged in Count 34 and incorporated into Count 35 purportedly as a "crime of violence" was a violation of VICAR murder (§ 1959(a)(1)), premised on the state offense of murder in violation of Virginia Code § 18.2-32 (first and second-degree murder). The elements for a conviction of VICAR murder are the same as those of VICAR assault other than that the offense committed must be murder under a state or federal law, rather than assault. And the Virginia murder statute alleged in Count 34 includes two offenses, first-degree murder and second-degree murder. Second-degree murder is defined as all murders that are not first-degree murder. Va. Code Ann. § 18.2-32. The parties agree that the allegations in the indictment charge Manley with second-degree murder.

The Virginia Supreme Court has held that Virginia's murder statute, Virginia Code § 18.2-32, codifies the common-law crime of murder. *See Flanders v. Commonwealth*, 838 S.E.2d 51, 56 (Va. 2020) ("[A]lthough Virginia law recognizes capital murder, first-degree murder, and second-degree murder and punishes each with different ranges of penalties[,] . . . all three gradations punish the same offense of common-law murder"). The crime of second-degree murder has two elements. First, the victim must be shown to have died as a result of the defendant's conduct, and second, the defendant's conduct must be shown to be malicious. *See Essex v. Commonwealth*, 322 S.E.2d 216, 220 (Va. 1984). In the absence of express malice, the malice element "may only be implied from conduct likely to cause

death or great bodily harm, willfully or purposefully undertaken." *Id.* Defining implied malice more fully, the Virginia Supreme Court has stated that it "encapsulates 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 v. Commonwealth*, 835 S.E.2d 902, 904 (Va. 2019) (cleaned up). This *mens rea* thus amounts to what the parties agree is "extreme recklessness."

The parties dispute, however, whether "extreme recklessness" is a level of *mens rea* sufficient to satisfy the statutory definition of a crime of violence in § 924(c)(3)(A) (requiring as an element "the use, attempted use, or threatened use of physical force against the person or property of another"). *Borden* specifically elected not to address whether a *mens rea* of extreme recklessness is sufficient to constitute a violent felony or crime of violence. *See Borden*, 141 S. Ct. at 1825 n.4 (plurality opinion). But the Court's analysis is nonetheless informative.

Borden addressed two distinct concepts: (1) what constitutes criminally culpable *mens rea*, and (2) what *mens rea* does the definition of "violent felony" require. In its discussion of the violent felony definition in the elements clause of § 924(e), which is similar to the definition in the elements clause in § 924(c)(3)(A) at issue here, the Court directs us to the statutory definition's requirement of the "*use* of physical force *against* the person of another," 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added), and notes that it "demands that the perpetrator direct his action at, or target, another individual," *Borden*, 141 S. Ct. at 1825 (plurality opinion). And that conclusion led the Court to hold that conduct that is

"purposeful" or "knowing" fits § 924(e)'s *mens rea* requirement, whereas conduct that is "reckless" or "negligent" does not. *Id.* at 1826–28. That holding was made within the context of the Court's general discussion of *mens rea*, where it observed that "four states of mind . . . give rise to criminal liability," which are "in descending order of culpability: purpose, knowledge, recklessness, and negligence." *Id.* at 1823. The Court acknowledged, however, that some statutes have a *mens rea* of "extreme recklessness," falling somewhere between "knowledge" and "recklessness" on the Court's scale. *Id.* at 1825 n.4. But it made clear that it was not addressing whether the definition of a violent felony could be satisfied with a *mens rea* of extreme recklessness. *Id.* We conclude, however, that the answer to that question can nonetheless be derived from the Court's analysis.

The Court allowed that extreme recklessness falls on the *mens rea* scale of culpability between "knowledge" and "recklessness," where "knowledge" is a sufficient *mens rea* for a violent felony and "recklessness" is not. *Borden*, 141 S. Ct. at 1825 n.4 (plurality opinion). It defined "knowledge" to exist when one "is aware that a result is *practically certain* to follow from his conduct" and "recklessness" to exist where one "*consciously disregards* a substantial and unjustifiable risk." *Id.* at 1823–24 (emphasis added) (cleaned up). Employing the Court's scale, we conclude that extreme recklessness, as defined by Virginia law, not only falls between "knowledge" and "recklessness" but also that it is closer in culpability to "knowledge" than it is to "recklessness." As the Virginia Supreme Court has stated, the implied-malice element of second-degree

murder encapsulates "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 (cleaned up). The Virginia Supreme Court has explained that this malice element may be "implied *by conduct*" when the conduct is "*so harmful*" to the victim as to support an inference of malice. *Id.* (emphasis added) (cleaned up). While this definition may not describe precisely the "practically certain" state of "knowing," it comes close. It follows, we conclude, that this formulation necessarily requires conduct that uses physical force *against* another, as required by the definition of a crime of violence in § 924(c)(3)(A).

Since *Borden* was decided, two other courts of appeals have reached the same conclusion that crimes involving a *mens rea* short of knowledge but greater than ordinary recklessness can qualify as crimes of violence. *See Alvarado-Linares v. United States*, 44 F.4th 1334, 1343–44 (11th Cir. 2022); *United States v. Begay*, 33 F.4th 1081, 1093 (9th Cir. 2022) (en banc), *petition for cert. denied*, 598 U.S. ____ (2022). And prior to *Borden*, the First Circuit similarly decided that second-degree murder under Puerto Rico law is a violent felony under § 924(e) because it requires "extreme recklessness" and therefore satisfies the elements clause, even though the First Circuit previously determined that ordinary recklessness does not suffice. *See United States v. Báez-Martínez*, 950 F.3d 119, 125–27 (1st Cir. 2020). We now join these courts.

Our conclusion that an offense with a *mens rea* of extreme recklessness satisfies the *mens rea* of a "crime of violence" accords with the context and

purpose of § 924(c). That statute assigns additional culpability to individuals who use or carry a firearm during the commission of a crime of violence, and murder is obviously among the most violent of crimes. Indeed, we have observed that "[c]ommon sense dictates that murder is categorically a crime of violence under the force clause." *In re Irby*, 858 F.3d 231, 237 (4th Cir. 2017). While we still must, of course, analyze the *mens rea* required in the commission of murder under any given statute, we believe that the difference between "extreme recklessness" and ordinary criminal recklessness assuages the concern articulated in *Borden* that a lower *mens rea* requirement may "blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and [all] other crimes." *Borden*, 141 S. Ct. at 1831 (plurality opinion) (quoting *Leocal*, 543 U.S. at 11).

C

At bottom, we hold that VICAR assault committed by violating Virginia Code § 18.2-51 and VICAR murder committed by violating Virginia Code § 18.2-32 are crimes of violence under § 924(c) and that Manley's convictions under Counts 25 and 35 are therefore valid.

III

NIEMEYER, Circuit Judge, as to this Part III:

Manley also contends that Counts 24 and 34, which are incorporated into Counts 25 and 35, to which he pleaded guilty, simply allege generic

assault and generic murder and that therefore we must focus on the elements of the VICAR offenses without regard to the counts' references to violations of state law. Indeed, he notes that he did not even plead guilty to state offenses because the state offenses were not mentioned in his plea agreement, the statement of facts, or the order accepting the plea. Based on these premises, he contends that VICAR assault can be committed with a *mens rea* of "ordinary recklessness" and therefore is not, by reason of *Borden*, a crime of violence, and that VICAR murder can be committed with a *mens rea* of "extreme recklessness," which is simply another form of recklessness insufficient to amount to a crime of violence.

First, I should note, as discussed above, that Manley's guilty plea was to Counts 25 and 35, which specifically incorporated Counts 24 and 34, respectively, charging Manley with the commission of VICAR assault and VICAR murder, the *elements* of which included violations of Virginia Code §§ 18-2.51 and 18-2.32, respectively. But addressing Manley's argument on the merits, I note that Manley simply overlooks the *mens rea* elements for the VICAR violations.

While Manley focuses only on the *mens rea* elements of generic assault and generic murder standing alone, he fails to account for the necessary VICAR element (5) that the assault or murder be committed "as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from" a racketeering enterprise or "for the purpose of gaining entrance to or maintaining or increasing position" in the racketeering enterprise. 18 U.S.C. § 1959(a). Thus,

to be guilty of VICAR assault or VICAR murder, a defendant must carry out the assault or murder for a racketeering-related pecuniary purpose or with the purpose of improving his position in a racketeering enterprise. And "purpose," as *Borden* explained, is a state of mind where the defendant "'consciously desires' a particular result." 141 S. Ct. at 1823 (plurality opinion) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)). It follows that, when a defendant assaults or murders to gain a personal collateral advantage with an enterprise, he makes a decision — a deliberate choice — to carry out the assault or the murder to demonstrate his worth to the enterprise. This state of mind is more culpable than the reckless conduct described in *Borden*. As *Borden* noted, the definition of a violent felony or a crime of violence "covers purposeful and knowing acts." *Id.* at 1826. For this reason, I also conclude — in addition to our conclusions that Virginia law provides a sufficient *mens rea for* both offenses — that VICAR assault and VICAR murder require a *mens rea* sufficient to support the *mens rea* of a crime of violence within the meaning of § 924(c)(3) and that therefore Manley's convictions under § 924(c)(1) are valid.

Manley argues nonetheless that a defendant can engage in conduct with the specific intent to increase or maintain his position in a racketeering enterprise without simultaneously intending to use or threaten force. He offers the example of a defendant who drives a get-away car recklessly to evade police and kills someone, as well as the example of a defendant who drives drunk and causes serious bodily harm after getting behind the wheel because a fellow gang member dared him to do so. He maintains that these

defendants would be acting with the specific intent of gaining or maintaining a position in the enterprise without intending to use force against the person or property of another.

This argument, however, cannot be accepted if we are to remain faithful to the VICAR text. VICAR's "purpose" element requires that the defendant commit the assault or murder "for the purpose of gaining entrance to or maintaining or increasing position" in the enterprise, *not that the defendant commit any act with that purpose that may then have the unintended consequences of resulting in assault or murder*. 18 U.S.C. § 1959(a). In Manley's examples, the hypothetical defendant may separately be acting with a purpose to increase his position in the enterprise, but he is not acting with that purpose with respect to committing the assault or murder. The get-away driver intends to escape the police and the drunk gang member intends to impress his fellow gang members, both in connection with their role in the enterprise. But if they harm someone negligently or recklessly in the process, *the harm* was not committed "for the purpose of" increasing their position in the enterprise. VICAR's purpose element demands a closer tie between the purpose of maintaining or increasing position in the enterprise and the commission of the assault or murder.

IV

Counts 24 and 34 of the indictment alleged violations of VICAR assault and VICAR murder, respectively, with their multiple layers of *mens rea* ranging from extreme recklessness to

purposefulness. And common sense confirms that a defendant who, as part of his role in a racketeering enterprise, commits an assault with a dangerous weapon or that results in serious bodily injury or commits second-degree murder, commits a crime of violence, as he *used or threatened to use force against* the person of another.

The judgment of the district court is accordingly

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Newport News Division

CIVIL ACTION N0.4:20cv22
[ORIGINAL CRIMINAL N0.4:08cr144]

MARTIN J. MANLEY,
Petitioner,
v.

UNITED STATES,
Respondent.

FINAL ORDER

This matter comes before the court on the Petitioner's Motion to Vacate pursuant to 28 U.S.C. § 2255 ("Motion"), filed pro se on February 18, 2020. ECF No. 511. The United States filed a Response on March 19, 2020. ECF No. 519. The Petitioner did not file a Reply.

I. Procedural History

On October 19, 2009, the Petitioner pleaded guilty to Counts One, Twenty-five, and Thirty-five of the Indictment. ECF No. 275. Count One charged the Petitioner with Racketeering Conspiracy, in violation of 18 U.S.C. § 1962(d). ECF No. 30. Count Twenty-five charged the Petitioner with Use, Brandish and Discharge of a Firearm in Relation to a Crime of Violence, in violation of 18 U.S. C. § 924 (c)(1). Id. The predicate "crime of violence" for Count Twenty-five 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 Twenty-four of the Indictment. Id. Count Thirty-five charged the Petitioner with Use and Discharge of a Firearm in Relation to a Crime of Violence Resulting in Death, in violation of 18 U.S. C. § 924(c)(1) and (j). Id. The predicate "crime of violence" for Count Thirty-five was Murder in Aid of Racketeering Activity, in violation of 18 U.S.C. § 1959(a)(1), as charged in Count Thirty-four of the Indictment. Id.

On February 26, 2010, the court sentenced the Petitioner to three hundred sixty (360) months on Count One, to be served concurrently with Count Thirty-five, one hundred twenty (120) months on Count Twenty-five, to be served consecutively to Count Thirty-five, and Life on Count Thirty-five. ECF No. 331.

On July 22, 2011, the court reduced the Petitioner's sentence on Count Thirty-five from Life to three hundred sixty (360) months imprisonment. ECF No. 389. In all other respects the Petitioner's judgment remained the same. See id.

II. Motion to Vacate

The Petitioner filed the instant Motion on February 18, 2020, seeking to vacate his convictions on Counts Twenty-five and Thirty-five based on the United States Supreme Court's decision in United States v. Davis, 139 S. Ct. 2319 (2019).[1] Mot. at 4.

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[1] The United States does not argue that the Petitioner's Motion is untimely. Accordingly, the court will assume that the Petitioner's claim is timely under 28 U.S.C. § 2255 because Davis "newly recognized" a right that has been "made retroactively applicable to cases on collateral review." Id. § 2255(f) (3).

In Davis, the Supreme Court held that the definition of a "crime of violence" in the "residual clause," 18 U.S.C. § 924(c)(3)(B), is unconstitutionally vague. Id. at 2336. The definition of a "crime of violence" in the "force clause," 18 U.S.C. § 924(c)(3)(A) , remains constitutionally valid. The questions presented, therefore, are whether the predicate crimes of violence for Counts Twenty-five and Thirty-five remain constitutionally valid under the force clause in§ 924(c).

The Petitioner's predicate crime of violence for count Twenty-five is Assault with a Dangerous Weapon in Aid of Racketeering Activity, in violation of 18 U.S.C. § 1959(b)(2). This court recently explained in Ellis v. United States, __ F. Supp. 3d __, No. 4:08CR144, 2020 WL 1844792 (E.D. Va. Apr. 10, 2020) (Smith, J.) why Assault with a Dangerous Weapon in Aid of Racketeering Activity remains constitutionally valid after Davis. See id. at *2-3. For the reasons set forth in that Memorandum Final Order, the court again holds that this predicate crime of violence is constitutional because it falls within the force clause. Accordingly, the Petitioner's conviction on Count Twenty-five for Use, Brandish and Discharge of a Firearm in Relation to a Crime of Violence also remains constitutional. See id.[2]

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[2] The United States argues that the Petitioner's conviction on Count Twenty-five remains valid because he shot a person. Resp. at 5. This shooting, however, is charged in Count Thirty-four. See ECF No. 30 at 63. The predicate crime for Count Twenty-five is a separate assault, as charged in Count Twenty-four. See ECF No. 30 at 49-50. Accordingly, the United States failed to address why Count Twenty-four remains a constitutionally valid predicate crime of violence.

Next, the Petitioner challenges his conviction on Count Thirty-five. Because the statute for the predicate crime of violence charged in Count Thirty-four, 18 U.S.C. § 1959, is divisible, the court uses the "modified categorical approach" to determine whether the crime is a crime of violence. See Cousins v. United States, 198 F. Supp. 3d 621, 625-26 (E.D. Va. 2016) (Smith, C.J.). Under the modified categorical approach, the court "looks at the charging documents" to determine the crime with which the Petitioner was convicted. Id. Here, the Indictment shows that the Petitioner was convicted of Murder in Aid of Racketeering Activity, in violation of 18 U.S.C. § 1959(a)(1). ECF No. 30 at 63-64.

To determine whether Murder in Aid of Racketeering Activity is a crime of violence, "the court must look at the elements of the VICAR [violent crime in aid of racketeering activity] predicate as it is generically defined." Cousins, 198 F. Supp. 3d at 626. "The common law definition of murder is the unlawful killing of another human being with malice aforethought." Id. (citing Schad v. Arizona, 501 U.S. 624, 640 (1991)). Common law murder "certainly involves 'the use, attempted use, or threatened use of physical force against the person.'" Id. (quoting 18 U.S.C. § 924(c)(3)(A). Accordingly, the court concludes that Murder in Aid of Racketeering Activity qualifies as a crime of violence under the force clause in § 924(c)(3)(A). See In re Irby, 858 F.3d 231, 237 (4th Cir. 2017) ("Common sense dictates that murder is categorically a crime of violence under the force

clause."); Cousins, 198 F. Supp. 3d at 626.[3] Because of this, the Petitioner's conviction on Count Thirty-five for Use and Discharge of a Firearm in Relation to a Crime of Violence Resulting in Death remains constitutionally valid.[4]

Accordingly, for the above reasons, the Motion is **DENIED.** The Petitioner is **ADVISED** that he may appeal from this Order by filing, within sixty (60) days of entry of this Order, a written notice of appeal with the Clerk of the United States District Court, 2400 West Avenue, Newport News, Virginia 23607. The court declines to issue a certificate of appealability for the reasons stated herein.

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[3] Some "courts have looked beyond the generic definition of the enumerated VICAR offense to the elements of the crime, state or federal, underlying the VICAR charge." United States v. Davis, No. 4:18-CR-00011, 2019 WL 3307235 at *3 (W.D. Va. July 23, 2019). Here, the underlying state charge is murder, in violation of Va. Code. Ann. § 18.2-32. This state offense also qualifies as a crime of violence under the force clause. United States v. Mathis, 932 F. 3d 242, 265 (4th Cir. 2019) ("[W]e conclude that the crime of first-degree murder under Virginia law qualifies categorically as a crime of violence under the force clause."); United States v. Simmons, No. 2:16CR130, 2018 WL 6012368 at *2 (E.D. Va. Nov. 16, 2018) (Davis, C. J.) (holding that all violations of Va. Code Ann. 18.2-32 fall within 18 U.S.C. § 924(c)(3)(A))).

[4] The United States argues that the Petitioner's conviction on Count Thirty-five remains valid because "[t]he defendant shot Vaughn … Thus, the defendant's conduct involved the use of physical force as contemplated by the federal statute." Resp. at 5. This argument is incorrect. The Fourth Circuit has held that, in determining whether an offense falls within the force clause, courts should not examine "the particular facts in the case." United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019); see, e.g., id.; United States v. McNeal, 818 F.3d 141, 152 (4th Cir. 2016).

The Clerk is **DIRECTED** to forward a copy of this Order to the Petitioner and the United States Attorney at Newport News.

IT IS SO ORDERED.

/s/ Rebecca Beach Smith
Senior United States District Judge

April 28, 2020

FILED October 19, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA,

v. 4:08CR144

MARTIN JAY MANLEY,
Defendant.

ORDER ACCEPTING GUILTY PLEA

Defendant, by consent, has appeared before the Court pursuant to Federal Rule of Criminal Procedure 11, and referral from a United States District Judge and has entered guilty pleas to an indictment charging him with conspiracy to engage in racketeering acts (Count 1), in violation of 18 U.S.C. § 1962(d); discharging a firearm in relation to a crime of violence (Count 25), in violation of 18 U.S.C. § 924(d); and use of a firearm resulting in death (Count 35), in violation of 18 U.S.C. $ 924(c) and (j). Defendant is also charged with drug conspiracy (Count 2); conspiracy to interfere with commerce by robbery (Count 3); interference with commerce by robbery (Count 22); using, carrying, and brandishing a firearm in relation to a crime of violence (Count 23); assault with a dangerous weapon in aid of racketeering (Count 24); maiming in aid of racketeering (Count 33); and murder in aid

of racketeering (Count 34). Defendant understands that the additional counts will be dismissed with prejudice upon acceptance of his guilty plea. Counsel for the United States confirmed defendant's understanding.

After cautioning and examining defendant under oath concerning each of the subjects mentioned in Rule 11, the Court determined that the guilty plea was knowledgeable and voluntary and that the offense charged is supported by an independent basis in fact, establishing each of the essential elements of such offense. Therefore, the Court accepts the guilty plea and the plea agreement.

The Court certifies that a copy of this Order was delivered this day to all counsel of record.

/s/
James E. Bradberry
United States Magistrate Judge

Norfolk, Virginia
October 19, 2009

FILED: December 28, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6812 (4:08-cr-00144-RBS-3)
(4:20-cv-00022-RBS)

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

MARTIN JAY MANLEY, a/k/a Buck
Defendant – Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk

STATUTES

18 U.S.C. § 924(c)(3):

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) 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.

18 U.S.C. § 1959:

(a) 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 so to do, shall be punished--

(1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years or for life, or a fine under this title, or both;

(2) for maiming, by imprisonment for not more than thirty years or a fine under this title, or both;

(3) for assault with a dangerous weapon or assault resulting in serious bodily injury, by imprisonment for not more than twenty years or a fine under this title, or both;

(4) for threatening to commit a crime of violence, by imprisonment for not more than five years or a fine under this title, or both;

(5) for attempting or conspiring to commit murder or kidnapping, by imprisonment for not more than ten years or a fine under this title, or both; and

(6) for attempting or conspiring to commit a crime involving maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, by imprisonment for not more than three years or a fine of1 under this title, or both.

(b) As used in this section--

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.

EXCERPTS FROM INDICTMENT

COUNT TWENTY-FOUR

(Assault with Dangerous Weapon in Aid of Racketeering Activity)

1. As described in Paragraphs 1 through 6 of Count One of this Indictment, which are realleged and incorporated herein, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," together with other persons, known and unknown, were members and associates of a criminal organization, that is, an enterprise, as defined in Title 18, United States Code, Section 1959(b)(2), namely the Dump Squad, a group of individuals associated in fact that engaged in, and the activities of which affected, interstate and foreign commerce. The Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. A primary purpose of the Enterprise, which operated primarily within certain neighborhoods in Newport News, Virginia, was to protect its territory or "turf" in those neighborhoods through acts of violence, which allowed the Enterprise's members to earn money through robberies and the sale of controlled substances within that territory or "turf in those neighborhoods.

2. The above-described enterprise, through its members and associates, engaged in racketeering activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1), namely, acts involving murder, robbery, assault and arson in violation of Va. Code Ann. §§ 18.2-18, 18.2-22, 18.2-

26, 18.2-32, 18.2-51, 18.2-58, and 18.2-80, narcotics trafficking in violation of Title 21, United States Code, Sections 841 and 846, and acts indictable under Sections 1512 (obstruction of justice) and 1951 (robbery) of Title 18, United States Code.

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

(In violation of Title 18, United States Code, Section 1959(a)(3)).

COUNT TWENTY-FIVE

(Use, Brandish and Discharge of a Firearm in Relation to a Crime of Violence)

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

Indictment, which is realleged and incorporated herein.

(In violation of Title 18, United States Code, Section 924(c) (1)).

COUNT THIRTY-FOUR

(Murder in Aid of Racketeering Activity)

1. As described in Paragraphs 1 through 6 of Count One of this Indictment, which arc realleged and incorporated herein, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," together with other persons, known and unknown, were members and associates of a criminal organization, that is, an enterprise, as defined in Title 18, United States Code, Section 1959(b)(2), namely the Dump Squad, a group of individuals associated in fact that engaged in, and the activities of which affected, interstate and foreign commerce. The Enterprise constituted an ongoing organization whose members functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise. A primary purpose of the Enterprise, which operated primarily within certain neighborhoods in Newport News, Virginia, was to protect its territory or "turf" in those neighborhoods through acts of violence, which allowed the Enterprise's members to earn money through robberies and the sale of controlled substances within that territory or "turf" in those neighborhoods.

2. The above-described enterprise, through its members and associates, engaged in racketeering

activity as defined in Title 18, United States Code, Sections 1959(b)(1) and 1961(1), namely, acts involving murder, robbery, assault and arson in violation of Va. Code Ann. §§ 18.2-18, 18.2-22, 18.2-26, 18.2-32, 18.2-51, 18.2-58, and 18.2-80, narcotics trafficking in violation of Title 21, United States Code, Sections 841 and 846, and acts indictable under Sections 1512 (obstruction of justice) and 1951 (robbery) of Title 18, United States Code.

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

(In violation of Title 18, United States Code, Section 1959(a)(1)).

COUNT THIRTY-FIVE

(Use and Discharge of a Firearm in Relation to a Crime of Violence Resulting in Death)

On or about December 24, 2007, in Hampton, Virginia, in the Eastern District of Virginia, the defendant, MARTIN JAY MANLEY, a/k/a "Buck," did unlawfully and knowingly use, carry, brandish and discharge a firearm during and in relation to a crime of violence for which he may be prosecuted in a Court of the United States, that is, Murder in Aid of Racketeering Activity in violation of Title 18, United

States Code, Section 1959(a)(1), as set forth in Count Thirty-four of this Indictment, which is realleged and incorporated herein, and in the course of said offense, caused the death of Tony Vaughan, through the use of a firearm, and the killing constituted murder as defined in Title 18, United States Code, Section 1111(a) in that the killing was committed with malice aforethought.

(In violation of Title 18, United States Code, Sections 924(c) (1) and (j)).

FILED: October 19, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA

v. CRIMINAL NO. 4:08cr144

MARTIN JAY MANLEY,
Defendant.

PLEA AGREEMENT

Neil H. MacBride, United States Attorney for the Eastern District of Virginia, Laura P. Tayman, Assistant United States Attorney, the defendant, MARTIN JAY MANLEY, and the defendant's counsel, Timothy G. Clancy and Melinda Ruth Glaubke, have entered into an agreement pursuant to Rule 11 of the Federal Rules of Criminal Procedure. The terms of the agreement are as follows:

1. Offense and Maximum Penalties

The defendant agrees to plead guilty to Counts One, Twenty-five and Thirty-five of the indictment. Count One charges the defendant with conspiracy to engage in racketeering acts, in violation of Title 18, United States Code, Section 1962(d). The maximum penalties for the offense in Count One are life

imprisonment, a $250,000 fine, full restitution and 5 years of supervised release. Count Twenty-five charges the defendant with discharging a firearm in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c). The maximum penalties for the offense in Count Twenty-five are a mandatory minimum term of imprisonment of 10 years which must run consecutive to all other sentences, a maximum term of life imprisonment, a fine of $250,000, full restitution, a special assessment, and 5 years of supervised release. Count Thirty-five charges the defendant with use of use of a firearm resulting in death, in violation of Title 18, United States Code, Section 924(c) and (j). The maximum penalties for the offense in Count Thirty-five are a maximum term of life imprisonment, a $250,000 fine, full restitution and 5 years of supervised release. The defendant understands that the supervised release terms are in addition to any prison term the defendant may receive, and that a violation of a term of supervised release could result in the defendant being returned to prison for the full term of supervised release.

2. Factual Basis for the Plea

The defendant will plead guilty because the defendant is in fact guilty of the charged offenses. The defendant admits the facts set forth in the statement of facts filed with this plea agreement and agrees that those facts establish guilt of the offenses charged beyond a reasonable doubt. The statement of facts, which is hereby incorporated into this plea agreement, constitutes a stipulation of facts for

purposes of Section 1B1.2(a) of the Sentencing Guidelines.

3. Assistance and Advice of Counsel

The defendant is satisfied that the defendant's attorneys have rendered effective assistance. The defendant understands that by entering into this agreement, defendant surrenders certain rights as provided in this agreement. The defendant understands that the rights of criminal defendants include the following:

a. the right to plead not guilty and to persist in that plea;

b. the right to a jury trial;

c. the right to be represented by counsel — and if necessary have the court appoint counsel — at trial and at every other stage of the proceedings; and

d. the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses.

4, Role of the Court and the Probation Office

The defendant understands that the Court has jurisdiction and authority to impose any sentence within the statutory maximum described above but that the Court will determine the defendant's actual sentence in accordance with Title 18 United States Code, Section 3553(a). The defendant understands

that the Court has not yet determined a sentence and that any estimate of the advisory sentencing range under the U.S. Sentencing Commission's Sentencing Guidelines Manual the defendant may have received from the defendant's counsel, the United States, or the Probation Office, is a prediction, not a promise, and is not binding on the United States, the Probation Office, or the Court. Additionally, pursuant to the Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S. Ct. 738 (2005), the Court, after considering the factors set forth in Title 18 United States Code, Section 3553(a), may impose a sentence above or below the advisory sentencing range, subject only to review by higher courts for reasonableness. The United States makes no promise or representation concerning what sentence the defendant will receive, and the defendant cannot withdraw a guilty plea based upon the actual sentence. The United States and the defendant agree that the defendant has assisted the government in the investigation and prosecution of the defendant's own misconduct by timely notifying authorities of the defendant's intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the Court to allocate their resources efficiently. If the defendant qualifies for a two-level decrease in offense level pursuant to U.S.S.G. § 3E1.1(a) and the offense level prior to the operation of that section is a level 16 or greater, the government agrees to file, pursuant to U.S.S.G. § 3E1.1(b), a motion prior to, or at the time of, sentencing for an additional one-level decrease in the defendant's offense level.

5. Waiver of Appeal

The defendant also understands that Title 18, United States Code, Section 3742 affords a defendant the right to appeal the sentence imposed. Nonetheless, the defendant knowingly waives the right to appeal the conviction and any sentence within the statutory maximum described above (or the manner in which that sentence was determined) on the grounds set forth in Title 18, United States Code, Section 3742 or on any ground whatsoever, in exchange for the concessions made by the United States in this plea agreement. This agreement does not affect the rights or obligations of the United States as set forth in Title 18, United States Code, Section 3742(b).

6. Waiver of DNA Testing

The defendant also understands that Title 18, United States Code, Section 3600 affords a defendant the right to request DNA testing of evidence after conviction. Nonetheless, the defendant knowingly waives that right. The defendant further understands that this waiver applies to DNA testing of any items of evidence in this case that could be subjected to DNA testing, and that the waiver forecloses any opportunity to have evidence submitted for DNA testing in this case or in any post-conviction proceeding for any purpose, including to support a claim of innocence to the charges admitted in this plea agreement.

7. Special Assessment

Before sentencing in this case, the defendant agrees to pay a mandatory special assessment of one hundred dollars ($100.00) per count of conviction, for a total special assessment of $300.00.

8. Payment of Monetary Penalties

The defendant understands and agrees that, pursuant to Title 18, United States Code, Section 3613, whatever monetary penalties are imposed by the Court will be due and payable immediately and subject to immediate enforcement by the United States as provided for in Section 3613. Furthermore, the defendant agrees to provide all of his financial information to the United States and the Probation Office and, if requested, to participate in a pre-sentencing debtor's examination. If the Court imposes a schedule of payments, the defendant understands that the schedule of payments is merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment. If the defendant is incarcerated, the defendant agrees to participate in the Bureau of Prisons' Inmate Financial Responsibility Program, regardless of whether the Court specifically directs participation or imposes a schedule of payments.

9. Restitution for Offense of Conviction

The defendant agrees to the entry of a Restitution Order for the full amount of the victims' losses.

10. Immunity from Further Prosecution in this District

The United States will not further criminally prosecute the defendant in the Eastern District of Virginia for the specific conduct described in the indictment or statement of facts, except that the United States may prosecute the defendant for any crime of violence or conspiracy to commit, or aiding and abetting, a crime of violence not charged in the indictment as an offense. In such a prosecution the United States may allege and prove conduct described in the indictment or statement of facts. "Crime of violence" has the meaning set forth in Title 18 United States Code, Section 16.

11. Dismissal of Other Counts

As a condition of the execution of this agreement and the Court's acceptance of the defendant's plea of guilty, the United States will move to dismiss the remaining counts of the indictment against this defendant.

12. Defendant's Cooperation

The defendant agrees to cooperate fully and truthfully with the United States, and provide all information known to the defendant regarding any criminal activity as requested by the government. In that regard:

a. The defendant agrees to testify truthfully and completely at any grand juries, trials or other proceedings.

b. The defendant agrees to be reasonably available for debriefing and pre-trial conferences as the United States may require.

c. The defendant agrees to provide all documents, records, writings, or materials of any kind in the defendant's possession or under the defendant's care, custody, or control relating directly or indirectly to all areas of inquiry and investigation.

d. The defendant agrees that, at the request of the United States, the defendant will voluntarily submit to polygraph examinations, and that the United States will choose the polygraph examiner and specify the procedures for the examinations.

e. The defendant agrees that the Statement of Facts is limited to information to support the plea. The defendant will provide more detailed facts relating to this case during ensuing debriefings.

f. The defendant is hereby on notice that the defendant may not violate any federal, state, or local criminal law while cooperating with the government, and that the government will, in its discretion, consider any such violation in evaluating whether to file a motion for a downward departure or reduction of sentence,

g. Nothing in this agreement places any obligation on the government to seek the defendant's cooperation or assistance.

13. Use of Information Provided by the Defendant Under This Agreement

The United States will not use any truthful information provided pursuant to this agreement in any criminal prosecution against the defendant in the Eastern District of Virginia, except in any prosecution for a crime of violence or conspiracy to commit, or aiding and abetting, a crime of violence (as defined in Title 18 United States Code, Section 16). Pursuant to U.S.S.G. section 1B1.8, no truthful information that the defendant provides under this agreement will be used in determining the applicable guideline range, except as provided in section 1B1.8(b). Nothing in this plea agreement, however, restricts the Court's or Probation Officer's access to information and records in the possession of the United States. Furthermore, nothing in this agreement prevents the government in any way from prosecuting the defendant should the defendant knowingly provide false, untruthful, or perjurious information or testimony. The United States will bring this plea agreement and the full extent of the defendant's cooperation to the attention of other prosecuting offices if requested.

14. Prosecution in Other Jurisdictions

The United States Attorney's Office for the Eastern District of Virginia will not contact any other state or federal prosecuting jurisdiction and voluntarily turn over truthful information that the defendant provides under this agreement to aid a prosecution of the defendant in that jurisdiction. Should any other prosecuting jurisdiction attempt to

use truthful information the defendant provides pursuant to this agreement against the defendant, the United States Attorney's Office for Eastern District of Virginia agrees, upon request, to contact that jurisdiction and ask that jurisdiction to abide by the immunity provisions of this plea agreement. The parties understand that the prosecuting jurisdiction retains the discretion over whether to use such information.

15. Defendant Must Provide Full, Complete and Truthful Cooperation

This plea agreement is not conditioned upon charges being brought against any other individual. This plea agreement is not conditioned upon any outcome in any pending investigation. This plea agreement is not conditioned upon any result in any future prosecution which may occur because of the defendant's cooperation. This plea agreement is not conditioned upon any result in any future grand jury presentation or trial involving charges resulting from this investigation. This plea agreement is conditioned upon the defendant providing full, complete and truthful cooperation.

16. Motion for a Downward Departure

The parties agree that the United States reserves the right to seek any departure from the applicable sentencing guidelines, pursuant to Section 5K1.1 of the Sentencing Guidelines and Policy Statements, or any reduction of sentence pursuant to Rule 35(b) of the Federal Rules of Criminal Procedure, if, in its sole discretion, the

United States determines that such a departure or reduction of sentence is appropriate.

17. Breach of the Plea Agreement and Remedies

This agreement is effective when signed by the defendant, the defendant's attorney, and an attorney for the United States. The defendant agrees to entry of this plea agreement at the date and time scheduled with the Court by the United States (in consultation with the defendant's attorney). If the defendant withdraws from this agreement, or commits or attempts to commit any additional federal, state or local crimes, or intentionally gives materially false, incomplete, or misleading testimony or information, or otherwise violates any provision of this agreement, then:

a. The United States will be released from its obligations under this agreement, including any obligation to seek a downward departure or a reduction in sentence. The defendant, however, may not withdraw the guilty plea entered pursuant to this agreement;

b. The defendant will be subject to prosecution for any federal criminal violation, including, but not limited to, perjury and obstruction of justice, that is not time-barred by the applicable statute of limitations on the date this agreement is signed; and

c. Any prosecution, including the prosecution that is the subject of this agreement, may be premised upon any information provided, or statements made, by the defendant, and all such

information, statements, and leads derived therefrom may be used against the defendant. The defendant waives any right to claim that statements made before or after the date of this agreement, including the statement of facts accompanying this agreement or adopted by the defendant and any other statements made pursuant to this or any other agreement with the United States, should be excluded or suppressed under Fed. R. Evid. 410, Fed. R. Crim. P, 11(f), the Sentencing Guidelines or any other provision of the Constitution or federal law.

Any alleged breach of this agreement by either party shall be determined by the Court in an appropriate proceeding at which the defendant's disclosures and documentary evidence shall be admissible and at which the moving party shall be required to establish a breach of the plea agreement by a preponderance of the evidence. The proceeding established by this paragraph does not apply, however, to the decision of the United States whether to file a motion based on "substantial assistance" as that phrase is used in Rule 35(b) of the Federal Rules of Criminal Procedure and Section 5K1.1 of the Sentencing Guidelines and Policy Statements. The defendant agrees that the decision whether to file such a motion rests in the sole discretion of the United States.

18. Nature of the Agreement and Modifications

This written agreement constitutes the complete plea agreement between the United States, the

defendant, and the defendant's counsel. The defendant and his attorney acknowledge that no threats, promises, or representations have been made, nor agreements reached, other than those set forth in writing in this plea agreement, to cause the defendant to plead guilty. Any modification of this plea agreement shall be valid only as set forth in writing in a supplemental or revised plea agreement signed by all parties.

Neil H. MacBride
United States Attorney

By: /s/ Laura P. Tayman
Assistant United States Attorney

Defendant's Signature: I hereby agree that I have consulted with my attorneys and fully understand all rights with respect to the pending criminal indictment. Further, I fully understand all rights with respect to Title 18 United States Cade, Section 3553 and the provisions of the Sentencing Guidelines Manual that may apply in my case. I have read this plea agreement and carefully reviewed every part of it with my attorney. I understand this agreement and voluntarily agree to it.

Date: 10/19/09

/s/ MARTIN JAY MANLEY
Defendant

Defense Counsel Signature: We are counsel for the defendant in this case. We have fully explained to the defendant the defendant's rights with respect to the pending indictment. Further, we have reviewed Title 18 United States Code, Section 3553 and the Sentencing Guidelines Manual, and we have fully explained to the defendant the provisions that may apply in this case. We have carefully reviewed every part of this plea agreement with the defendant. To my knowledge, the defendant's decision to enter into this agreement is an informed and voluntary one.

Date: 10/19/09
/s/ Timothy G. Clancy
Counsel for the Defendant

Date: 10/19/09
/s/ Melinda Ruth Glaubke
Counsel for the Defendant

FILED: October 19, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA

v. CRIMINAL NO. 4:08cr144

MARTIN JAY MANLEY
a/k/a "Buck",
Defendant.

STATEMENT OF FACTS

This statement of facts is submitted in support of the defendant's pleas of guilty to Counts One, Twenty-five and Thirty-five of the pending indictment. Count One charges conspiracy to engage in racketeering activities, in violation of Title 18, United States Code, Section 1962(d) and (c). Count Twenty-five charges discharging a firearm in relation to a crime of violence, in violation of Title 18, United States Code, Section 924(c). Count Thirty-five charges the defendant with use of a firearm during a crime of violence resulting in death, in violation of Title 18, United States Code, Sections 924(c) and (j). This statement of facts contains information necessary to support the guilty pleas to Counts One and Twenty-five and Thirty-five. If the United States were to try this case, the evidence that

would be proved beyond a reasonable doubt would be:

1. Between the years 2003 and 2009, MARTIN JAY MANLEY, a/k/a "Buck" was a member and associate of the "Dump Squad" street gang, which was also at times known as "Slump Mobb" and "Bang Gang," a criminal organization which operated principally in the Ridley Circle, Harbor Homes and Dickerson Court areas of Newport News, Virginia. Members 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 "Dump Squad."

2. Members of the "Dump Squad" would and did physically identify themselves as Enterprise members by flashing hand signs, to express their affiliation with 17th Street and 12th Street, reflecting their affiliation with the Enterprise and the Streets controlled by the Enterprise. Members also would and did obtain tattoos related to the Enterprise such as, "12th Street," "Soulja," and "17th", and boasted about the existence of the Enterprise in rap songs and on internet website postings. This defendant, MARTIN MANLEY, has the number "17th" tattooed on his hand reflecting his affiliation with the "Dump Squad" and their control of the area at 17th Street and Jefferson Avenue. Further, members would and did spray paint graffiti at various locations within Ridley Circle, Dickerson Court and Harbor Homes, marking those locations as being the territory they controlled.

3. Members of the "Dump Squad" would and did carry firearms to intimidate others and protect

themselves from rival gangs within Newport News and from outsiders from other cities. Specifically, "Dump Squad" members carried firearms to intimidate and protect themselves from the "Wickham Boys," a rival faction within the city of Newport News.

4. At all times relevant to this indictment and the underlying facts as charged, defendant MARTIN MANLEY did knowingly and unlawfully conspire with other "Dump Squad" members to distribute and possess with the intent to distribute cocaine base, commonly known as crack cocaine, a Schedule II narcotic controlled substance, and marijuana, a Schedule 1 controlled substance, in the areas controlled by the "Dump Squad" in the city of Newport News, within the Eastern District of Virginia.

5. When acting in furtherance of this conspiracy, MARTIN MANLEY and other members of the "Dump Squad" purposely targeted rival drug dealers for robbery, in an effort to obtain controlled substances and drug proceeds for use and distribution by "Dump Squad" members. Drug trafficking is an inherently economic enterprise that affects interstate commerce.

6. On or about October 4, 2006, MARTIN MANLEY became aware that Jarice Royal and another rival gang member were visiting females in the Ridley Circle apartment complex. When Jarice Royal and the other individual exited the apartment and headed towards a yellow pick-up truck. Travis Horton made a distinctive whistling noise designed to alert MARTIN MANLEY. MARTIN MANLEY then approached the yellow pick-up truck with a firearm drawn. MARTIN MANLEY fired the firearm

repeatedly into the vehicle as Jarice Royal and the other individual attempted to leave the parking lot. Jarice Royal was struck by a bullet in the back of his left shoulder. Jarice Royal was treated for the gunshot wound at Riverside Hospital.

7. During this investigation, law enforcement agents recovered a video recording made by "Dump Squad" members on which MARTIN MANLEY is shown rapping and heard boasting in the rap song about shooting Jarice Royal. MARTIN MANLEY's shooting of Jarice Royal on October 4, 2006 was done for the benefit of the "Dump Squad," a criminal street gang, and to increase and enhance MARTIN MANLEY's position within the "Dump Squad." The "Dump Squad" is a criminal Enterprise where membership, respect and status are accorded based on the willingness of members to engage in acts of violence.

8. On December 24, 2007, MARTIN MANLEY, Latroy Urquhart, Rickey Rice, Travis Horton and other "Dump Squad" members were at the Atmosphere Club in Hampton, Virginia. Shortly before 1:00 a.m., MARTIN MANLEY was bumped by someone on or near the dance floor. MARTIN MANLEY began to fight with that individual and other "Dump Squad" members joined in the assault. Management at the night club made all of the patrons leave the building. In the parking lot outside, MARTIN MANLEY stated to other "Dump Squad" members that he was going to "drop" the next person he saw. MARTIN MANLEY spotted Tony Vaughan and began to fight with him. Rickey Rice, Travis Horton and other members of the "Dump Squad" then participated in beating and kicking Tony Vaughan. While Tony Vaughan was

being beaten by other members of the "Dump Squad," MARTIN MANLEY obtained a firearm and shot Tony Vaughan to death. MARTIN MANLEY and other "Dump Squad" members left the Atmosphere Club and returned to Newport News. While traveling from Hampton to Newport News, MARTIN MANLEY gave the firearm used to murder Tony Vaughan to Latroy Urquhart.

9. On December 24, 2007 at 1:19 a.m., officers with the Hampton Police Department responded to the Atmosphere Club and found Tony Vaughan lying on the ground outside the club. Tony Vaughan was suffering from a gunshot wound and was transported to the hospital where he was declared dead at 2:06 a.m. The medical examiner determined that the cause of Tony Vaughan's death was a single gunshot wound to the chest. The bullet removed from Tony Vaughan's chest was determined to be a .38 caliber/.357 magnum bullet. The medical examiner observed multiple blunt force injuries to the head, torso and extremities of Tony Vaughan.

10. On March 26, 2009, MARTIN MANLEY was arrested on the pending indictment by FBI Agent Baber and Task Force Agent Kempf. MARTIN MANLEY was advised of his constitutional rights as required by the Miranda decision and stated that he understood his rights and wanted to speak with the agents. MARTIN MANLEY provided information to the agents about drug trafficking activities by himself and other "Dump Squad" members and admitted to shooting Jarice Royal on October 4, 2006 with a black, LARSEN .380 caliber firearm. MARTIN MANLEY explained that Jarice Royal was shot because another "Dump Squad" member told MANLEY that Jarice Royal was going to seek

retaliation against "Dump Squad" members for robbing two individuals that associated with Jarice Royal.

11. MARTIN MANLEY also stated to agents that on December 24, 2007, he traveled to the Atmosphere Club with Latroy Urquhart and others in his girlfriend's white Ford Crown Victoria. MARTIN MANLEY stated that he smoked marijuana and consumed ecstasy pills prior to leaving for the club. MARTIN MANLEY stated that while he was dancing someone bumped him and he began to argue and fight with the individual. MANLEY stated that others joined in the fight and that security guards broke up the fight and ordered everyone to leave the club. MARTIN MANLEY stated that once outside the club, he was approached by someone he later found out was Tony Vaughan. MANLEY stated that he believed Tony Vaughan to be associated with the person beaten inside the club, MARTIN MANLEY stated that a fight ensued and he observed several others, including Travis Horton, begin to attack Tony Vaughan. As Tony Vaughan was knocked to the ground and being beaten by the group, MARTIN MANLEY stated that he was pulled away from the group and that he was handed a .38 caliber pistol by Latroy Urquhart. MARTIN MANLEY then stated that he forcibly moved through the crowd of people beating Tony Vaughan and fired one shot at Tony Vaughan. MARTIN MANLEY stated that he later learned he had killed Tony Vaughan. MARTIN MANLEY stated that he gave the firearm used to kill Tony Vaughan to Latroy Urquhart while they were traveling from Hampton back to Newport News.

12. MARTIN MANLEY conspired with other "Dump Squad" members to commit the above-mentioned crimes. The "Dump Squad" constitutes an Enterprise which engaged in activities which affect interstate or foreign commerce and conducts its affair through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 1962(d).

Respectfully submitted,

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After consulting with my attorney and pursuant to the plea agreement entered into this day between the defendant, MARTIN JAY MANLEY and the United States, I hereby stipulate that the above Statement of Facts is true and accurate, and that had the matter proceeded to trial, the United States would have proved the same beyond a reasonable doubt.

/s/ MARTIN JAY MANLY

We are MARTIN JAY MANLEY's attorneys. We have carefully reviewed the above Statement of Facts with him. To our knowledge, his decision to stipulate to these facts is an informed and voluntary one.

/s/ Timothy G. Clancy
Counsel for MARTIN MANLEY

/s/ Melinda Ruth Glaubke
Counsel for MARTIN MANLEY