

No. _____

IN THE
Supreme Court of the United States

CARLOS EMANUEL KINARD.,
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

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

ERIC JOSEPH BRIGNAC
CHIEF APPELLATE ATTORNEY
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
eric_brignac@fd.org

Counsel for Petitioner

QUESTION PRESENTED

The federal VICAR assault statute criminalizes committing an assault “in violation of the laws of any State or the United States” for purposes of joining or advancing in a racketeering enterprise. 18 U.S.C. § 1959(a)(3).

18 U.S.C. § 924(c) criminalizes use or possession of a firearm in relation to a “crime of violence.”

This petition presents the question: **If the state or federal crime incorporated into an 18 U.S.C. § 1959(a)(3) conviction categorially does not meet the 18 U.S.C. § 924(c) definition of a “crime of violence,” can the VICAR conviction itself nonetheless meet the “crime of violence” definition?**¹

¹ This question is effectively the same question presented in the petition for certiorari pending before this Court in *Thomas v. United States*, No. 23-1168.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. Kinard, No. 94-5800

In re: Kinard, No. 06-322

United States v. Kinard, No. 09-7742

In re: Kinard, No. 19-426

United States v. Kinard, No. 21-7118

United States District Court for the Western District of North Carolina:

United States v. Kinard, No. 3:93-CR-215-GCM-6

TABLE OF CONTENTS

QUESTION PRESENTED	i
LIST OF ALL DIRECTLY RELATED PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT.....	3
REASONS FOR GRANTING THE PETITION.....	5
A. The Fourth Circuit holds that to determine whether an assault- based VICAR conviction categorically involves the "use" of force, courts do not look at the mens rea of the incorporated assault crime but instead at the purposeful mens rea from a different element of the VICAR statute.....	6
B. <i>Thomas</i> reveals an entrenched Circuit split	8
C. The Fourth Circuit is wrong	10
D. This Court may wish to hold this petition for appropriate action in light of the pending petition in <i>Thomas</i>.....	12

CONCLUSION.....	12
-----------------	----

APPENDIX:

Opinion of the U.S. Court of Appeals for the Fourth Circuit	1a
---	----

Order denying petition for rehearing en banc	19a
--	-----

TABLE OF AUTHORITIES

CASES

<i>Allen v. United States</i> , 2023 WL 4145321 (6th Cir. 2023)	10
<i>Alvarado-Linares v. United States</i> , 44 F.4th 1334 (11th Cir. 2022)	9
<i>Bordon v. United States</i> , 593 U.S. 420 (2021)	8, 11
<i>Davis v. United States</i> , 139 S. Ct. 2319 (2019)	4, 7
<i>In re: Kinard</i> 4th Cir. Case. No. 19-426 (unreported)	1, 4
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	4
<i>Manners v. United States</i> , 947 F.3d 377 (6th Cir. 2020)	10
<i>Nicolson v. United States</i> , 78 F.4th 870 (6th Cir. 2023)	10
<i>Tisdale v. United States</i> , 2022 WL 17496049 (6th Cir. 2022)	9
<i>United States v. Laurent</i> , 33 F.4th 63 (2d Cir. 2022)	9
<i>United States v. Manley</i> , 52 F.4th 143 (4th Cir. 2024)	7
<i>United States v. Morris</i> , 61 F.4th 311 (2d Cir. 2023)	9
<i>United States v. Pastore</i> , 36 F.4th 423 (2d Cir. 2022)	9

<i>United States v. Simmons</i> , 917 F.3d 312 (4th Cir. 2019).....	8
<i>United States v. Thomas</i> , 87 F.4th 267 (4th Cir. 2023)	4, 8, 10
<i>United States v. Toki</i> , 23 F.4th 1277 (10th Cir. 2022)	9
<i>United States v. White</i> , 7 F.4th 90 (2d Cir. 2021).....	9

STATUTES

N.C. Gen. Stat. § 14-33.....	7
18 U.S.C. § 924(c)(1)	6
18 U.S.C. § 924(c)(3)	6
18 U.S.C. § 924(c)(3) (1993)	6
18 U.S.C. § 924(c)(3)(A)	4-5, 7, 10
18 U.S.C. § 924(c)(3)(B)	5, 7
18 U.S.C. § 1959(a)	5, 7
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2253(a)	2
28 U.S.C. § 2253(c)(1)(B)	2
28 U.S.C. § 2255.....	1
28 U.S.C. § 2255(h)(2)	1

OTHER AUTHORITIES

Petition for Certiorari, <i>Thomas v. United States</i> , Sup. Ct. Doc. No. 23-1168.....	4, 12
Sup. Ct. R. 10(a)	5

IN THE
Supreme Court of the United States

CARLOS EMANUEL KINARD
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

Petitioner Carlos Kinard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's published opinion is reported at 93 F.4th 213 and is produced in the appendix to this petition. The Fourth Circuit denied a timely petition for rehearing which is produced in the appendix to this petition.

JURISDICTION

The Fourth Circuit granted Mr. Kinard permission to file a second or successive Section 2255 motion under 28 U.S.C. § 2255(h)(2). *See In Re: Kinard*, 4th Cir. No. 19-426. The district court had jurisdiction over that motion under 28 U.S.C. § 2255. The district court denied the motion on November 2, 2021 and did not grant a Certificate of Appealability.

Mr. Kinard appealed, and the Fourth Circuit granted a Certificate of Appealability “on the issue of whether assault under 18 U.S.C. § 1959(a)(3) or under N.C. Gen. Stat. § 14-33(c)(1) is a crime of violence under 18 U.S.C. § 924(c)(3)(A).” The Fourth Circuit had jurisdiction under 28 U.S.C. §§ 2253(a), (c)(1)(B) over the appeal of a Section 2255 motion for which a Certificate of Appealability had been granted.

The Fourth Circuit issued its opinion affirming the district court on February 20, 2024. The Fourth Circuit denied a timely petition for rehearing on April 19, 2024. This petition is being timely filed on July 8, 2024. This Court’s jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

. . . [A]ny person who, during and in relation to any crime of violence . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence . . .

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A).

For purposes of this subsection the term “crime of violence” means 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,

18 U.S.C. § 924(c)(3).

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—

(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;

18 U.S.C. § 1959(a)(3).

STATEMENT

In 1993, a grand jury sitting in the Western District of North Carolina indicted Mr. Kinard and eight co-defendants on thirty-seven counts related to a drug and racketeering conspiracy. Count 33 charged Mr. Kinard with using a firearm in relation to a crime of violence in violation of 18 U.S.C. § 924(c). The crime of violence at issue was Violent Crime in Aid of Racketeering (“VICAR”) in violation of 18 U.S.C. § 1959(a)(3). The crime underlying that VICAR was North Carolina Assault with a Dangerous or Deadly Weapon in violation of N.C. Gen. Stat. § 14-33.

The jury found Mr. Kinard guilty on twelve counts. The district court sentenced him to life imprisonment on 7 counts, all to be served concurrently. It sentenced him to 20 years on two counts, concurrent to the life sentences of the other counts. It sentenced him to 20 years consecutive to every other count on Count 33 and 20 years consecutive to every other sentence on Count 34. Under a later sentence reduction motion, the district court “reduced [Mr. Kinard’s] sentences for

three of the drug trafficking offenses (Counts One, Eleven, and Twelve) to 240 months' imprisonment," but it left the other sentences undisturbed.

In 2021, Mr. Kinard, having been granted authorization by the Fourth Circuit, filed a pro-se second or successive motion to vacate his conviction under 28 U.S.C. § 2255. *See In Re: Kinard*, 4th Cir. No. 19-426 at D.E. 12. He moved the district court to vacate his Count 33 conviction for violating Section 924(c). Specifically, he argued that *Davis v. United States*, 139 S. Ct. 2319 (2019), narrowed the Section 924(c) definition of a crime of violence, so his predicate offense of VICAR supported by North Carolina Assault no longer met that definition.

The district court denied Mr. Kinard's motion, holding that Mr. Kinard's VICAR conviction still met the post-*Davis* Section 924(c) crime of violence definition because it categorically involved the use of force. *See* 18 U.S.C. § 924(c)(3)(A). Mr. Kinard appealed, arguing that North Carolina Assault in violation of N.C. Gen. Stat. § 14-33 can be committed via reckless conduct, so it does not involve the "use" of force. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

The Fourth Circuit, bound by its recent decision in *United States v. Thomas*, 87 F.4th 267 (4th Cir. 2023), held that VICAR's "purpose" element requires an intentional mens rea, so the mens rea of the incorporated crime is irrelevant.² The Fourth Circuit then denied a timely petition for rehearing.

This petition follows.

² A petition for certiorari in *Thomas* is currently pending before this Court. *See Thomas v. United States*, No. 23-1168.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit “has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” Sup. Ct. R. 10(a).

VICAR criminalizes committing an incorporated state or federal crime for purposes of joining or advancing in a racketeering enterprise. 18 U.S.C. § 1959(a). It is thus an unusual statute because it incorporates, as an element, the elements of another crime.

If a defendant uses a firearm in connection with a VICAR offense, the United States sometimes charges the defendant under 18 U.S.C. § 924(c), alleging that the VICAR offense is a Section 924(c) predicate “crime of violence.” Prior to this Court’s decision in *Davis*, VICAR offenses met the “crime of violence” definition under the Section 924(c) residual clause, 18 U.S.C. § 924(c)(3)(B). Because, however, *Davis* struck down the residual clause as void for vagueness, courts now need to consider whether VICAR offenses meet the “crime of violence” definition under the elements clause as an offense that “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).

And the Circuit courts are irrevocably split on how to do that.

The **Second**, **Tenth**, and **Eleventh** Circuits hold that courts must look to the elements of the incorporated state or federal crime. If those elements categorically meet the Section 924(c) crime of violence definition, then so does the VICAR offense. If they do not, then the VICAR offense does not. It is that simple.

In contrast, the **Fourth** Circuit holds that courts must examine the other VICAR elements and make the crime of violence assessment based on those elements.

The **Sixth** Circuit seems internally inconsistent, sometimes adopting the Fourth Circuit's approach and sometimes adopting the Second, Tenth, and Eleventh Circuits' approach.

This Court's review is necessary to resolve this split.

- A. The Fourth Circuit holds that to determine whether an assault-based VICAR conviction categorically involves the “use” of force, courts do not look at the mens rea of the incorporated assault crime but instead at the purposeful mens rea from a different element of the VICAR statute.**

Section 924(c) prohibits “us[ing] or carr[ying] a firearm” “in relation to a crime of violence.” 18 U.S.C. § 924(c)(1).³ The statute defines a “crime of violence” as a felony offense that

(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.

Id. § 924(c)(3).

In 1993, Mr. Kinard's Count 33 VICAR conviction was categorically a crime of violence because it met the “residual clause” of the crime of violence definition as a crime “that by its nature involves a substantial risk that physical force . . . may

³ The 1993 version of the statute applies to Mr. Kinard's 1993 conviction, but Congress has not materially amended the crime of violence definition since that time, so he cites the current version of the statute in this petition. *Compare* 18 U.S.C. § 924(c)(3) (1993) *with* 18 U.S.C. § 924(c)(3).

be used.” 18 U.S.C. § 924(c)(3)(B). But in 2019, *Davis* struck down the Section 924(c) residual clause as unconstitutionally vague. 139 S. Ct. at 2336.

Thus, Mr. Kinard’s Count 33 VICAR conviction remains a crime of violence if and only if it meets the Section 924(c)(3)(A) force clause as an offense that categorically “has as an element the use, attempted use, or threatened use of force against the person or property of another.” 18 U.S.C. § 924(c)(3)(A).

To assess assault-based VICAR categorically, we must of course start with the elements of the crime. To prove assault-based VICAR, the government must show five things:

(1) that there [is] an “enterprise,” as defined in § 1959(b)(2); (2) that the enterprise [is] engaged in “racketeering activity,” as defined in 18 U.S.C. § 1961; (3) that the defendant [] 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 [was] committed for a designated pecuniary purpose or “for the purpose of gaining entrance to or maintaining or increasing position in [the] enterprise” [(the purpose element)].

United States v. Manley, 52 F.4th 143, 147 (4th Cir. 2024) (quoting 18 U.S.C. § 1959(a)). In Mr. Kinard’s particular case, the jury found that “the state or federal law” that he violated under the Fourth Element was North Carolina Assault with a Dangerous or Deadly Weapon in violation of N.C. Gen. Stat. § 14-33.

Before the Fourth Circuit’s decision in *United States v. Thomas*, assessing Mr. Kinard’s VICAR conviction would have been easy. Because “[b]efore *Thomas*, this Court’s ‘crime of violence’ analysis of predicate VICAR offenses started and ended with an evaluation of the fourth requirement, namely, whether the

incorporated state or federal offense satisfied the requirements of the § 924(c) force clause.” Pet. App. at 8a (Keenan, J. concurring).

“Had [the Fourth Circuit] followed that approach in this case, [it] would have concluded that the incorporated offense of assault with a deadly weapon under North Carolina law, N.C. Gen. Stat. § 14-33(c)(1), which can be committed with ‘culpable negligence,’ does not satisfy the mens rea requirement for a ‘crime of violence’ under the § 924(c) force clause” which requires the purposeful application of force. Pet. App. at 9a (Keenan, J. concurring) (citing *United States v. Simmons*, 917 F.3d 312, 321 (4th Cir. 2019), and *Borden v. United States*, 593 U.S. 420, 444 (2021) (plurality opinion)).

But *Thomas* changed everything. It held that “the final element of a substantive VICAR assault offense, namely, the purpose element, [can] establish the mens rea necessary for a predicate VICAR assault offense to qualify as a ‘crime of violence’ under § 924(c).” Pet. App. at 9a (Keenan, J. concurring) (citing *Thomas*, 87 F.4th at 273-74). This holding “resolve[d] [Mr. Kinard’s] appeal.” Pet. App. at 6a.

B. *Thomas* reveals an entrenched Circuit split.

As Judge Keenan explained, no other Circuit court has adopted *Thomas*’s approach. Pet App. at 9a (Keenan, J. concurring).

The Eleventh Circuit holds that in “the facts and circumstances of [a] case” where a VICAR indictment alleges and the jury instructions mention a specific incorporated state crime, then the categorical approach requires future courts to use the elements of that state crime to determine if it is a crime of violence. *Alvarado*-

Linares v. United States, 44 F.4th 1334, 1342-1343 (11th Cir. 2022). The Eleventh Circuit expressly rejected the government’s argument that it “should look only to the generic federal definition of ‘murder’ as that term is used in the statute.” *Id.* at 1342. And no mention is made of VICAR’s purpose element.

The Second Circuit holds that a “substantive VICAR offense hinges on the underlying predicate offense, . . . so [the courts] look to that predicate offense to” find the elements for the categorical analysis. *United States v. Pastore*, 36 F.4th 423, 429 (2d Cir. 2022) (internal quotation omitted); *see also United States v. Morris*, 61 F.4th 311, 318-19 (2d Cir. 2023) (same); *United States v. Laurent*, 33 F.4th 63, 85 (2d Cir. 2022) (same); *United States v. White*, 7 F.4th 90, 104 (2d Cir. 2021) (same).

Same with **the Tenth Circuit** in *United States v. Toki*, 23 F.4th 1277, 1280 (10th Cir. 2022). There the court held that the petitioners’ VICAR convictions were not Section 924(c) crimes of violence. *Id.* It reached that conclusion by categorically examining the “Utah and Arizona statutes criminalizing assault with a dangerous weapon” with no mention of the VICAR purpose element. *Id.*

The **Sixth Circuit** appears internally conflicted. In *Tisdale v. United States*, it refused to grant a Certificate of Appealability on the VICAR mens rea issue because in that particular case, “[a]ccording to the instructions given to the jurors, assault with a dangerous weapon in aid of racketeering requires that the defendant acted intentionally, not recklessly.” 2022 WL 17496049, at *2 (6th Cir. 2022) (emphasis added). *Tisdale* focused on the incorporated crime’s mens rea, not the mens rea of VICAR’s purpose element. In *Allen v. United States*, the Sixth Circuit used the

modified categorical approach to examine the Tennessee state offense incorporated into the Defendant’s VICAR conviction to determine the proper elements to examine. 2023 WL 4145321 at *2 (6th Cir. 2023) (unpublished).

But in *Manners v. United States*, 947 F.3d 377, 378-79 (6th Cir. 2020), and *Nicholson v. United States*, 78 F.4th 870, 876-80 (6th Cir. 2023), the Sixth Circuit categorically analyzes VICAR convictions seemingly without regard to the incorporated crimes.

The Circuit split is longstanding and intractable. This Court must resolve it.

C. The Fourth Circuit is wrong.

Thomas holds that VICAR’s “purposefulness requirement applies to every offense in § 1959(a)” *Thomas*, 87 F.4th at 274. And then expands that requirement to replace the mens rea of the incorporated crime at issue. *Id.* This expansion misreads VICAR.

Section 924(c)’s crime of violence definition includes crimes that have “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) (emphasis added). In *Borden*, this Court held that the “against the person or property of another” language requires intentionality not simply in the decision to use force, but also in the *decision to direct it towards another*. Pet. App. at 11a (Keenan, J. concurring) (citing *Borden*).

Thomas’s fatal flaw post-*Borden* is that “the mens rea required under the force clause thus differs from the mens rea required under the purpose element in

that the latter does not require a showing that the defendant knowingly directed force *at a target*.” Pet. App. at 12a (Keenan, J. concurring) (emphasis in original). So courts cannot use it to meet the Section 924(c) definition post-*Borden*. As Judge Keenan’s example explains:

[C]onsider a defendant riding in a car late at night who sees a rival gang member’s empty car parked on a deserted street in the defendant’s gang’s territory. The defendant fires a “warning shot” out his car’s window. As he passes the empty car, the defendant sees that the bullet has hit and injured a rival gang member, whom the defendant had not seen standing nearby. When the defendant returns to his gang’s headquarters, he brags to his superiors that he shot the rival gang member.

In that scenario, the defendant purposefully fired the gun, but he did not purposefully hit the individual he had not seen. Instead, in firing the gun and injuring a person, the defendant “pa[id] insufficient attention to the potential application of force” and “consciously disregard[ed] a substantial and unjustifiable risk.” *Borden*, 593 U.S. at 427, 432. In other words, the defendant in this example *recklessly* applied force to an individual, rather than *directing* force at a target.

Nevertheless, under our precedent, the defendant likely committed the assault “for the purpose of gaining entrance to or maintaining or increasing position in [the] enterprise,” as required to satisfy the purpose element of a substantive VICAR offense. In my view, as illustrated by the above scenario, proof of a “gang-related motive” under the purpose element does not, of itself, establish that the defendant consciously directed any force “against” a target, as required to qualify that offense as a § 924(c) “crime of violence.” *Borden*, 593 U.S. at 430–31.

Pet. App. at 13a-14a (Keenan, J. concurring) (some internal citations omitted) (emphasis in original).

Thus, in addition to resolving a circuit split, this Court’s review can serve to overturn an incorrect precedent.

D. This Court may wish to hold this petition for appropriate action in light of the pending petition in *Thomas*.

As noted above, the panel opinion in this case relies entirely on the Fourth Circuit's *Thomas* decision. A petition for certiorari in *Thomas* is currently pending before this Court in case No. 23-1168. Thus, in the interest of judicial efficiency, this Court may wish to hold this petition for consideration concurrently with or after it considers the petition in *Thomas* or take whatever other action this Court believes is appropriate.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

G. ALAN DUBOIS
FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF NORTH CAROLINA

/s/Eric J. Brignac
ERIC JOSEPH BRIGNAC
CHIEF APPELLATE ATTORNEY
Counsel of Record
EASTERN DISTRICT OF NORTH CAROLINA
150 Fayetteville St.
Suite 450
Raleigh, N.C. 27601
(919) 856-4236
eric_brignac@fd.org

JULY 8, 2024

Counsel for Petitioner