NO._____

In The
Supreme Court of the United States

MARCUS JAY DAVIS,
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

Anthony F. Anderson
Counsel of Record
Anderson Legal
1102 Second Street S.W.
P. O. Box 1525
Roanoke, Virginia 24007
Telephone: (540) 982-1525
afa@afalaw.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond, Virginia 23219 (804) 644-0477

QUESTION PRESENTED FOR REVIEW

Whether the Fourth Circuit Court of Appeals erred in deciding that attempted murder under Virginia law is a crime of violence under the categorical approach to 18 U.S.C. Section 924(c) and this Court's Decision in United States v. Taylor, 142 S. Ct. 2015 (2022).

STATEMENT OF RELATED CASES

United States v. Marcus Jay Davis, No. 4:18-cr-00011, United States District Court for the Western District of Virginia. Judgement entered September 30, 2020, as amended on June 4, 2021, and June 21, 2021.

United States v. Marcus Jay Davis, No. 20-4504, U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 23, 2024.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

CITATION TO OPINION BELOW

Filed with this Petition is the unpublished Opinion of the Unites States Court of Appeals for the Fourth Circuit dated April 23, 2024. (Pet. App., A1-A4).

Also filed with this Petition is the Memorandum Opinion and Order of the United States District Court for the Western District of Virginia dated July 27, 2019. (Pet. App. A5-A24).

JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Virginia had jurisdiction pursuant to 18 U.S.C. § 3231. A jury convicted Defendant, Marcus Jay Davis ("Davis") of Counts 1, 10, 11, 12, and 13 of the superseding indictment in his case on November 12, 2019. On February 26, 2020, the district court denied Davis's post-trial motions pursuant to Federal Rules of Criminal Procedure 29 and 33. A final judgment was entered sentencing Davis on the counts of conviction on September 30, 2020, and Davis filed a timely notice of appeal that same day. The Fourth Circuit Court of Appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

On April 23, 2024, the United States Court of Appeals for the Fourth Circuit affirmed Davis's conviction. The appeals court issued its mandate on May 15, 2024. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATUTES, RULES AND REGULATIONS

18 U.S.C. § 924(c)(1)(A) and (c)(3)(A)

(c)

(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) 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 or drug trafficking crime—

(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. . . .

(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 . . . .

18 U.S.C. § 1951(a)-(b)

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or 3 threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the

person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

18 U.S.C. 1959(a)(3) and (a)(5) (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—

(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; . . .

(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 . . .

18 U.S.C. § 1962(d)

. . . (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

STATEMENT OF THE CASE

This Petition raises the question of whether attempted murder under Virginia law is a crime of violence under the categorical approach to 18 U.S.C. Section 924(c) and this Court's Decision in United States v. Taylor, 142 S. Ct. 2015

(2022). If it is not, then Davis's conviction for Count 13, use of a firearm during a crime of violence, specifically attempted murder, is unlawful and must be reversed.

This multi-defendant, multi-count RICO prosecution arose in Danville, Virginia. Davis, was accused of being a leader in the Rollin 60's Crips street gang. He and other gang members were charged in a superseding indictment with violations of the Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. Section 1962, the Violent Crimes in Aid of Racketeering ("VICAR") statute, 18 U.S.C. Section 1959, and use of a firearm during crimes of violence under 18 U.S.C. 924(c).

Among the acts alleged in the superseding indictment were the attempted murder of Justion Wilson (Count 12). and use of a firearm during the attempted murder of Justion Wilson (Count 13).

Evidence at trial supported the following facts regarding Counts 12 and 13. On August 20, 2016, numerous gang members from the Rollin 60's Crips street gang gathered at the North Hills Apartment Complex in Danville, Virginia with a plan to shoot a rival gang member. Several of the members who gathered at the Complex were armed. The uncontradicted evidence was that Davis was not there at the Complex. While there was some evidence that Davis acquiesced to the shooting, there was no evidence that he knew a shooting was planned for that night.

Tragically, the armed gang members mistook a vehicle occupied by Justion Wilson and Christopher Motley for one containing the rival gang member, and they opened fire on the vehicle, prompting a rain of bullets that ended in the attempted

murder of Justion Wilson and the murder of Christopher Motley. The murder was the subject of Counts 10 and 11 of the superseding indictment and are not subject this petition. The attempted murder of Justion Wilson was the subject of Counts of Counts 12 and 13 of the superseding indictment.

Subsequently, Davis was charged in in indictment, and later a superseding indictment, which alleged that Davis was a leading member of the Rollin 60s Crips gang in Danville, Virginia. He was charged with RICO conspiracy, in violation of 18 U.S.C. § 1962(d) (Count 1). Additionally, among other charges, he was charged with the attempted murder in aid of racketeering of Justion Wilson, in violation of 18 U.S.C. § 1959(a)(5) (Count 12); and using a firearm in furtherance of a violent crime, the attempted murder of Justion Wilson alleged in Count 12, in aid of racketeering, in violation of 18 U.S.C. § 924(c)(1)(A) (Count 13). (CAJA V. III at 3347-3351).

Davis and his co-defendants moved the district court to dismiss several of the superseding indictment's counts, including Count 13, use of a firearm in the commission of attempted murder arguing that under Virginia law and the categorical approach, attempted murder is not a crime of violence.

The district court denied these motions in a memorandum opinion and order contained herein at Pet. App. at A5-A24.

After a jury trial, Davis was convicted of all counts. The Defendant filed post-trial motions for a judgment of acquittal under Federal Rules of Criminal Procedure 29 and 33, which were denied by the district court. (CAJA V.III at 3356-67, 3378-

3385). Davis was convicted to 27 years imprisonment including 10 years on Count 13. Davis timely filed a Notice of Appeal.

While his appeal was pending, Davis submitted notice pursuant to Fed. R. App. P. 28(j) and asserted that his conviction for using a firearm during a crime of violence, Virginia attempted murder (Count 13), should be reversed under the reasoning in United States v. Taylor, 142 S. Ct. 2015 (2022) (holding that attempted Hobbs Act robbery is not a crime of violence). The Court of Appeals ordered supplemental briefing on that issue and held the appeal in abeyance for a ruling in a case which raised the relevant issue, United States v. Lassiter, 96 F.4th 629 (4th Cir. 2024). In Lassiter, the Court held that a violent crime in aid of racketeering, attempted murder, was a crime of violence under 18 U.S.C. Section 924(c)(1)(A), (c)(3)(A). Based upon that holding, Davis's convictions were affirmed. The focus of this Petition to the United States Supreme Court is Davis's challenge to his convictions on Count 13 under the reasoning of Taylor.

Mr. Lassiter filed a Petition for Writ of Certiorari in this Court on May 22, 2024, which is pending (Case No. 23-7568).

ARGUMENT

The question presented in United States v. Taylor, 142 S. Ct. 2015 (affirming United States v. Taylor, 926 F.3d 203 (4th Cir. 2020)) was whether attempted Hobbs Act robbery is categorically a crime of violence under the elements clause of 18 U.S.C. Section 924(c)(3)(A). A person is guilty of a federal offense under the Hobbs

Act if he commits, attempts to commit, or conspires to commit a robbery that affects interstate commerce. 18 U.S.C. Section 1951(a).

Under 18 U.S.C. Section 924(c)(3)(A), known as the elements clause, a felony constitutes a categorical "crime of violence" if it has as an element the use, attempted use, or threatened use of physical force." Id.

The Taylor Court compared the elements of completed and attempted Hobbs Act robbery. To convict a defendant of carrying out a completed Hobbs Act robbery, the government must prove he unlawfully took or obtained property "…from the person…of another, against his will by means of actual or threatened force." 18 U.S.C. § 1951(b). The Court determined that *attempted* Hobbs Act robbery consists of two essential elements. "(1) The defendant intended to unlawfully take or obtain personal property by means of actual or threatened force, and (2) he completed a 'substantial step' toward that end." Taylor, 142 S. Ct. at 2020. Applying the categorical approach, the Court stated that attempted Hobbs Act robbery did not satisfy the elements clause of Section 924(c)(3)(A), even though Hobbs Act robbery does satisfy those elements. The Court explained that a defendant does not necessarily need to use or threaten to use force to be found guilty of attempted Hobbs Act robbery, even though actual or threatened use of force is an element of a completed Hobbs Act robbery. Id.

Therefore, attempted Hobbs Act robbery is not a proper predicate for a Section 924(c) conviction because it is not a categorical crime of violence. Taylor, 142 S. Ct. at 2026.

Like attempted robbery, the Virginia crime of attempted murder does not categorically require either the actual or attempted use of force. The elements of attempted murder under Virginia law are similar to those of attempted Hobbs Act robbery. To prove attempted murder, the Commonwealth must prove a specific intent to kill and an overt but ineffectual act committed in furtherance of the criminal purpose. Bottoms v. Commonwealth, 22 Va App 378, 382, 470 S.E.2d 153, 156 (Va. App. 1996). "In the context of attempted murder, the evidence must show 'specific intent to kill the victim,'" along with an overt act that falls short of the completion of the killing. Secret v. Commonwealth, 296 Va. 204, 225, 819 S.E.2d 234, 248 (2018) (quoting Commonwealth v. Herring, 788 Va. 59, 77, 758 S.E.2d 225, 235 (2014)). The overt act "need not … be the last proximate act to the consummation of the [murder], but is sufficient if it be an act apparently adopted to produce the result intended." Sizemore v. Commonwealth, 218 Va. 980, 983, 243 S.E.2 212, 214 (1978). There must be an overt act "done towards its commission, but falling short of the execution of the ultimate design." 218 Va. at 983, 243 S.E.2d at 214 (1978) (quoting Glover v. Commonwealth, 86 Va. 382, 385–86, 10 S.E. 420, 421 (1889)). The overt act "need not ... be the last proximate act to the consummation of the crime in contemplation, but is sufficient if it be an act apparently adopted to produce the result intended." Id. Therefore, it is clear that the overt act element of attempted murder under Virginia law does not necessarily involve the use, attempted use, or threatened use of force.

Thus, although there are some differences between the elements of attempted murder and attempted Hobbs Act robbery, neither offense requires the prosecution to prove as an element of the offense the use, attempted use or threatened use of force. Therefore, attempted murder under Virginia law cannot be a predicate for an 18 U.S.C. Section 924(c) conviction.

Accordingly, under Taylor, VICAR attempted murder alleged under Virginia law, like attempted Hobbs Act robbery, is not categorically a "crime of violence" within the elements clause of Section 924(c)(3)(A). Attempted murder can be effectuated without any violent force against the intended victim, just as a person can attempt a robbery (a crime of violence) without resorting to violence.

In this case and in Lassiter, the Fourth Circuit rejected these arguments holding that VICAR attempted murder is categorically a crime of violence and therefore a proper predicate for the Section 924(c) charge. Lassiter, 96 F.4th at 639. It reasoned that because every attempt to commit an offense which itself necessarily requires force to complete also must involve force. "If a completed crime of violence requires the *use* of force, then an attempt to commit that offense is a crime of violence because it necessarily requires the *attempted use* of force. Such is the relationship between murder and attempted murder under Virginia law." Id. at 639 [emphasis in original; internal citation omitted.]

This analysis ignores the reasoning and decision by Justice Gorsuch in Taylor. That reasoning did not hinge upon whether completed Hobbs Act robbery could be committed through an attempted threat of force rather than an actual use of force. In fact, Justice Gorsuch stated that the only question was, "whether the federal felony at issue always requires the government to prove – beyond a reasonable doubt, as an element of the case – the use, attempted use, or threatened use of force". Taylor, 142 Sup. Ct. at 2020.

This Court decided that attempted Hobbs Act robbery does not require the government to prove as an element the use of force, attempted force, or a threat of force. Therefore, attempted Hobbs Act robbery, irrespective of the elements of completed Hobbs Act robbery, is not a crime of violence. Similarly, attempted murder under Virginia law, regardless of the elements of completed murder, does not require proof of the use, attempted use, or threatened use of force.

Therefore, the district court and the Fourth Circuit were erroneous in determining that Davis's conviction on Count 13 for use of a firearm during attempted murder should be confirmed.

Importantly, there are other United States Circuit Courts that reach the same conclusion as the Fourth Circuit in Lassiter. See Dorsey v. United States, --- F.4th ----, 2023 WL 5159582, at *1 (9th Cir. Aug. 11, 2023); Alvarado-Linares v. United States, 44 F.4th 1334, 1346-47 (11th Cir. 2022); States v. States,72 F.4th 778, 787-88 (7th Cir. 2023). These decisions highlight the need for this Court to solve the tension between these Circuit Court rulings and this Court's decision in Taylor.

The United States District Court for the Western District of Virginia had original jurisdiction over Davis's criminal case pursuant to 18 U.S.C. Section 3231. "The district Courts of the United States shall have original jurisdiction exclusive of the courts of the States, of all offenses against the laws of the United States." Id. Furthermore, Danville, Virginia is within the jurisdiction of the United States District Court for the Western District of Virginia.

CONCLUSION

For these reasons, the Supreme Court should grant Marcus Davis's Petition for Writ of Certiorari.

/s/ Anthony F. Anderson
Anthony F. Anderson
Counsel of Record
Anderson Legal
1102 Second Street S.W.
P.O. Box 1525
Roanoke, Virginia 24007
Telephone: (540) 982-1525
afa@afalaw.com
Counsel for Petitioner

July 22, 2024

NO._____

In The
Supreme Court of the United States

MARCUS JAY DAVIS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

APPENDIX

Anthony F. Anderson
Counsel of Record
Anderson Legal
1102 Second Street S.W.
P. O. Box 1525
Roanoke, Virginia 24007
Telephone: (540) 982-1525
afa@afalaw.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
1108 East Main Street Suite 1201 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

Page

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4504

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MARCUS JAY DAVIS, a/k/a Sticcs,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Michael F. Urbanski, Chief District Judge. (4:18-cr-00011-MFU-RSB-1)

Submitted: April 16, 2024 Decided: April 23, 2024

Before KING, WYNN, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ON BRIEF: Anthony F. Anderson, ANDERSON LEGAL, Roanoke, Virginia, for Appellant. Christopher R. Kavanaugh, United States Attorney, Laura Day (Rottenborn) Taylor, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

After a jury trial, Marcus Jay Davis was convicted of being a member of a criminal organization, the Rollin 60s Crips gang, that engaged in murder, assault, and the trafficking of controlled substances in Danville, Virginia, in violation of 18 U.S.C. §§ 1962(d), 1963, use of a firearm during a crime of violence, murder, in aid of racketeering, in violation of 18 U.S.C. § 924(j), violent crime, attempted murder, in aid of racketeering and aiding and abetting such conduct, in violation of 18 U.S.C. §§ 1959(a)(5), 2, and use of a firearm during a crime of violence, attempted murder, in aid of racketeering, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). We affirm.

Davis asserts that the district court erred in instructing the jury on the *Pinkerton*[*] doctrine of liability. He does not claim that the evidence did not support application of the doctrine or that the court erred by misstating the doctrine. Rather, he asserts that the doctrine is no longer viable in light of the Supreme Court's decisions in *Rosemond v. United States*, 572 U.S. 65 (2014), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We recently reaffirmed the validity of the *Pinkerton* doctrine and Davis provides no reason to revisit it. *See United States v. Gillespie*, 27 F.4th 934, 941 (4th Cir. 2022).

Davis also asserts that the district court erred in denying his request that the jury be given a withdrawal instruction. "[A] defendant's membership in a conspiracy is presumed to continue until he withdraws from the conspiracy by affirmative action. A withdrawal must be shown by evidence that the defendant acted to defeat or disavow the purposes of

[*] *Pinkerton v. United States*, 328 U.S. 640 (1946).

the conspiracy." *United States v. Bush*, 944 F.3d 189, 196 (4th Cir. 2019) (citation and internal quotation marks omitted). "Withdrawal terminates the defendant's liability for postwithdrawal acts of his co-conspirators, but he remains guilty of conspiracy." *Smith v. United States*, 568 U.S. 106, 111 (2013). Davis bears the burden of proving that he withdrew from a conspiracy. *United States v. Walker*, 796 F.2d 43, 49 (4th Cir. 1986). "Mere cessation of activity in furtherance of the conspiracy is insufficient. The defendant must point to affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States v. Shephard*, 892 F.3d 666, 673 (4th Cir. 2018) (citation and internal quotation marks omitted). We agree with the district court that there was no evidence that Davis withdrew from the conspiracy prior to the murder and attempted murder and we conclude that the denial of the instruction was not an abuse of discretion. *United States v. Spirito*, 36 F.4th 191, 209 (4th Cir. 2022) (stating standard or review).

While this appeal was pending, Davis submitted notice pursuant to Fed. R. App. P. 28(j) and asserted that his conviction for using a firearm during a crime of violence, Virginia attempted murder (Count 13), was called into question by the Supreme Court's decision in *United States v. Taylor*, 596 U.S. 845 (2022) (holding that attempted Hobbs Act robbery is not a crime of violence). We ordered supplemental briefing on the issue and then placed this appeal in abeyance for *United States v. Lassiter*, 96 F.4th 629 (4th Cir. 2024) (holding that a violent crime in aid of racketeering, attempted murder, premised on Virginia attempted murder, was a crime of violence under 18 U.S.C. § 924(c)(1)(A), (c)(3)(A)). Now that *Lassiter* has issued and the supplemental briefs filed,

the issue is ripe for our consideration. Davis' assertion that Virginia attempted murder is not a crime of violence is foreclosed by this court's decision in *Lassiter*. Davis' conviction for using a firearm during a crime of violence, attempted murder, remains valid.

Accordingly, we affirm the amended judgment of conviction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No.: 4:18-cr-00011
v.	)	
	)	
	)	
MARCUS JAY DAVIS, et al.,	)	
	)	By: Michael F. Urbanski
Defendants.	)	Chief United States District Judge

MEMORANDUM OPINION

This matter comes before the court on a number of motions by defendants to dismiss and/or merge certain counts of the First Superseding Indictment. ECF No. 207. These motions require the court to tread down the thorny path of the categorical approach, again addressed by the Supreme Court of the United States as recently as June 24, 2019 in United States v. Davis, No. 18-431 (June 24, 2019).

I.

This multi-defendant, multi-count RICO prosecution began on June 11, 2018 when a federal grand jury issued two indictments bringing charges against members of the Rollin 60s Crips street gang, the Milla Bloods street gang, and gang associates on violations of the Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. § 1962, Violent Crimes in Aid of Racketeering ("VICAR") statute, 18 U.S.C. § 1959, and several other factually related charges. ECF No. 1; ECF No. 207. These cases are captioned United States v. Davis et al., 4:18-cr-11 (bringing charges against members of the Rollin 60s Crips and associates) and United States v. Anthony et al., 4:18-cr-12 (bringing charges against members of the Milla

Bloods street gang and associates).[1] The United States alleges that, in the summer of 2016, members of the Rollin 60s and Milla Bloods collaborated to facilitate criminal activities in the Danville, Virginia area. See ECF No. 207 (describing alleged racketeering conspiracy). This collaboration resulted in (1) the attempted murders of the "Philly Boys" at North Hills Court on June 15, 2016, resulting in the assault and attempted murder of Armonti Womack and Dwight Harris; (2) the attempted murder of Justion Wilson and murder of Christopher Motley at North Hills Court on August 20, 2016; and (3) the attempted Murder of Tyliek Conway on August 24, 2016.

Since the return of the First Superseding Indictment, four of the original twelve defendants have entered guilty pleas (Matthew Ferguson, ECF No. 226; Jaquan Trent, ECF No. 369; Laquante Tarvares Adams, ECF No. 378; and Shanicqua Coleman, ECF No. 435). The remaining defendants have filed a series of motions to dismiss, challenging counts alleging violation of 18 U.S.C. §§ 924(c), 924(j), and 1959. The government has responded, argument was held in June 8, 2019, and the issue is ripe for consideration.

II.

As an overview, the indictment in this gang case charges in Count 1 a RICO conspiracy and in Counts 2 through 19 various violent crimes associated with three shootings in Danville, Virginia in the summer of 2016.[2] As to each shooting, three categories of federal crimes are alleged:

[1] While the charges associated with the alleged RICO conspiracy have been brought in two cases, one for each implicated street gang, all docket numbers used in citations here are in reference to motions and memorandums filed in Davis, 4:18-cr-11.

[2] In Counts 20 through 40, the First Superseding Indictment also charges a number of crimes ancillary to the RICO and VICAR charges, including accessory after the fact, obstruction of justice, false declarations before grand jury, and witness tampering. These counts are not at issue in the pending motions.

1. VICAR Murder or Attempted Murder (Counts 2, 6, 10, 12 and 16);
2. VICAR Assault with a Dangerous Weapon (Counts 4, 8, 14, 18); and
3. Use of a Firearm During a VICAR crime, Murder, Attempted Murder, and Assault with a Dangerous Weapon (Counts 3, 5, 7, 9, 11, 13, 15, 17 and 19).

A.

On May 31, 2019, the government filed a Motion to Dismiss Counts 5, 9, 15, and 19 without prejudice. ECF No. 490. Counts 5, 9, 15, and 19 charge Use of a Firearm During VICAR Assault with a Dangerous Weapon. The government's motion is **GRANTED** and Counts 5, 9, 15, and 19 are **DISMISSED**.

B.

There are two principal issues surrounding the remaining motions to dismiss: (1) whether counts charging violations of 18 U.S.C. § 924(c) predicated on murder or attempted murder should be dismissed because "murder," as defined by Virginia Code § 18.2-32, categorically speaking, criminalizes conduct that is broader than that covered by 18 U.S.C. § 924(c)(3)(A); and (2) whether the VICAR assault with a dangerous weapon counts must be dismissed because the underlying Virginia brandishing statute, Va. Code § 18.2-282, sweeps too broadly to serve as a VICAR predicate.

III.

The court first examines 18 U.S.C. § 924(c), as predicated on Va. Code 18.2-32.

A.

18 U.S.C. § 924(c) provides that "any person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of

such crime, possesses a firearm" shall be sentenced to a five-year minimum term of imprisonment "in addition to the punishment provided for such crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(3)(A). The statute defines a crime of violence as "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 such a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Each of the above clauses provides a different basis for determining whether a crime is a crime of violence. Section 924(c)(3)(A) has been variously referred to as the "force clause," "use-of-force clause," or "elements clause."[3] Section 924(c)(3)(B) is known as the "residual clause."

The elements clause requires courts to use the categorical approach to determine "whether the statutory elements of the offense necessarily require the use, attempted use, or threatened use of force." United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019). In conducting this analysis, the court must "focus on the minimum conduct required to sustain a conviction for the state crime." United States v. Doctor, 842 F.3d 306, 308 (4th Cir. 2016). Thus, if the minimum conduct necessary for a violation of the statute does not constitute a crime of violence, then the statute categorically fails to qualify as a crime of violence. United States v. Gardner, 823 F.3d 793, 803 (4th Cir. 2016) (quoting Castillo v. Holder, 776 F.3d 262, 267 (4th Cir. 2015)).

[3] Most recently, the Supreme Court in Davis referred to § 924(c)(1)(A) as the "elements" clause, and this opinion follows suit.

In Simms, the Fourth Circuit declared the residual clause of § 924(c)(3)(B) unconstitutionally vague, as other residual clauses with almost identical language in a variety of other statutes had likewise been declared, because it required courts ask whether the "ordinary case" of the offense posed the requisite "substantial risk that physical force against the person or property may be used" without providing any guidance on how to determine the crime's ordinary case. 914 F.3d at 236–37. The Supreme Court's recent opinion in Davis closes the door on the viability of § 924(c)'s residual clause.

Following Simms and Davis, the criminal conduct at hand must be analyzed under the elements clause of § 924(c)(3)(A) to determine if it constitutes a crime of violence. Considered generically,[4] if the elements of the underlying offense do not require the use, attempted use, or threatened use of physical force under the elements clause of § 924(c)(3)(A), there can be no separate conviction under § 924(c)(1)(A) for using, carrying, brandishing, or discharging a firearm during or in relation to the underlying offense.

B.

To determine if VICAR murder and VICAR attempted murder are crimes of violence under § 924(c)(3)(A), courts have taken different analytical approaches. Some courts assess whether the VICAR predicate offenses, here murder and attempted murder, constitute crimes of violence by using a generic, federal definition of the crime. See United States v. Jones, No. 7:16-cr-30026, 2017 WL 3725636, at *5 (W.D. Va. 2017), and Cousins v. United States, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016) (both looking to a federal generic definition of an offense

[4] As the Supreme Court noted recently in Davis, "everyone agrees that, in connection with the elements clause, the term 'offense' carries the first, 'generic' meaning." Davis, slip op. at 10.

to determine if it is a viable VICAR predicate). The Fourth Circuit has held that generic, federal murder is a crime of violence for § 924(c)(3)(A) purposes. 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. . . . It is absurd to believe that Congress would have intended poisoners and people who use their wits to place someone in the path of an inevitable force to avoid the force clause of § 924(c)."). As such, under this analytical approach, VICAR murder and VICAR attempted murder are crimes of violence under the elements clause of § 924(c)(3)(A).

Other 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. Here, those crimes are Virginia murder and attempted murder, as defined in Va. Code §§ 18.2-32 and 18.2-26. Defendants advocate this approach, arguing that at least one method of murder proscribed by the Virginia statute, murder by starving, does not require the use of force.

First degree murder in Virginia is "murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate or animate object sexual penetration, robbery, burglary, or abduction." Va. Code § 18.2-32. "In the context of attempted murder, the evidence must show 'specific intent to kill the victim,'" along with an overt act that falls short of the completion of the killing. Secret v. Commonwealth, 296 Va. 204, 225, 819 S.E.2d 234, 248 (2018) (quoting Commonwealth v. Herring, 288 Va. 59, 77, 758 S.E.2d 225, 235 (2014)). The overt act "need not . . . be the last proximate act to the consummation of the [murder], but is sufficient if it be an act apparently adopted to produce

the result intended." Sizemore v. Commonwealth, 218 Va. 980, 983, 243 S.E.2d 212, 214 (1978).

C.

The Virginia murder statute, Va. Code § 18.2-32, is an "indivisible" statute, meaning that that it "enumerates various factual means of committing a single element." Mathis v. United States, 136 S. Ct. 2243, 2249 (2016). The Virginia Model Jury Instructions teach that there are three elements required to prove first degree murder:

(1) That the defendant killed (name of person): and

(2) That the killing was malicious; and

(3) That the killing [was willful, deliberate and premeditated; occurred by poison; occurred by lying in wait; occurred by imprisonment; occurred by starving].

1 Virginia Model Jury Instructions – Criminal; Instruction No. 33.200(a).

Because the Virginia murder statute § 18.2-32 is not divisible, the categorical approach must be used to evaluate whether the minimum conduct necessary for a violation constitutes a § 924(c)(3)(A) crime of violence. This approach requires a court to look to whether the statutory elements of the offense necessarily require the use, attempted use, or threatened use of physical force. This approach is termed categorical because it requires a court to consider only the crime as defined, not the particular facts of the case. As the Fourth Circuit stated in Simms, "[w]e will refer to the force clause inquiry as the *elements-based* categorical approach, because it begins and ends with the offense's elements. When a statute defines an offense in a way that allows for both violent and nonviolent means of commission, that offense is not 'categorically' a crime of violence under the force clause." 914 F. 3d at 233.

Defendants argue that, because the Virginia statute defining murder lists starving as one means of accomplishing it, Virginia murder is not categorically a crime of violence. See, e.g., ECF No. 342, at 6. Defendants posit that a person could conceivably commit murder by starving an infant or a bedridden invalid without using any force, terming murder by starving to be a matter of inaction, rather than action. As such, they argue, neither Virginia murder nor or attempted murder can support a conviction under the elements clause of § 924(c)(3)(A).

The government in its response argues that murder and attempted murder as defined by Virginia law can support a conviction under § 924(c)(3)(A) and finds arguments to the contrary "absurd," given the Supreme Court's holding in United States v. Castleman, 572 U.S. 157 (2014). ECF No. 492, at 9. In Castleman, the Supreme Court examined respondent's motion to dismiss his indictment under 18 U.S.C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." Respondent argued that his previous conviction for "intentionally or knowingly caus[ing] bodily injury to" the mother of his child did not qualify as a "misdemeanor crime of domestic violence" because it did not involve "the use or attempted use of physical force."

The Supreme Court disagreed, citing two reasons. First, it held that a "bodily injury" must result from "physical force."

> [A]s we explained in Johnson [v. United States, 559 U.S. 133, 138 (2010)], "physical force" is simply "force exerted by and through concrete bodies," as opposed to "intellectual or emotional force." And the common-law concept of "force" encompasses even its indirect application. . . . It is impossible to cause bodily injury without applying force in the common-law sense.

572 U.S. at 170.

Second, the Court focused on mens rea, concluding that "the knowing or intentional application of force is a 'use' of force." Id. Rejecting the argument that use of poison does not involve force, the Court reasoned that "[t]he 'use of force' in Castleman's example is not the act of 'sprinkl[ing]' the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter." Id. at 171.

The Fourth Circuit recently had occasion to examine the reach of Castleman in United States v. Battle, 927 F.3d 160, 166-67 (2019), where it held:

> In sum, Castleman teaches us that the requisite mens rea is crucial in the force analysis. "[T]he knowing or intentional causation of bodily injury necessarily involves the use of physical force." Castleman, 572 U.S. at 169. Again, Castleman held that the use of physical force was an element of his conviction because "[i]t is impossible to cause bodily injury without applying force." Id. at 170. Here AWIM [Maryland Assault with Intent to Murder] requires the specific intent to bring about the death of the assault victim. Following Castleman, it is impossible to intend to cause injury or death without physical force as contemplated under the ACCA. [5]

The holding in Castleman, especially concerning the mens rea element, compels the conclusion that murder and attempted murder in Virginia are crimes of violence.

D.

Consistently, and regardless of the analytical approach employed, five different federal judges in Virginia have rejected the arguments raised by defendants that Virginia murder is not a crime of violence under the force clause of § 924(c)(3)(A).

[5] The ACCA (Armed Career Criminal Act) includes both an elements and residual clause with much the same language as § 924(c)(3). The ACCA's residual clause was declared unconstitutional in Johnson v. United States,135 S. Ct. 2551 (2015), and thus a violent crime to support an enhanced sentence under the ACCA requires the same analysis as outlined under § 924(c). See United States v. Winston, 850 F.3d 677, 683 (4th Cir. 2017).

First, in a RICO gang case tried in this district, Judge Glen E. Conrad dismissed the argument made by defendants herein. As Judge Conrad explained, "applying the Supreme Court's reasoning in Castleman, the court has no difficulty concluding that murder, even if by poison or starvation, requires the use of physical force against the victim such that it qualifies as a crime of violence under § 924(c)(3)(A)." United States v. Mathis, No. 3:14cr00016, 2016 WL 8285758 (W.D. Va. Jan. 25, 2016).

Considering the common law definition of murder, Judge Rebecca Beach Smith of the Eastern District of Virginia concluded in Cousins v. United States, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016), that "[t]he intentional killing of another certainly involves 'the use, attempted use, or threatened use of physical force against the person,' and thus, Murder in Aid of Racketeering Activity qualifies as a crime of violence under the force clause in § 924(c)(3)(A)."

In United States v. Cuong Gia Le, 206 F. Supp. 3d 1134 (E.D. Va. 2016), Judge T.S. Ellis, III, expressly considering the argument that the Virginia murder statute, Va. Code § 18.2-32, includes murder by "poison" and "starving," nonetheless concluded that "murder, as defined by Va. Code § 18.2-32, constitutes a crime of violence pursuant to the force clause of § 924(c)." Id. at 1148.

Defendants in United States v. Simmons, No. 2:16-cr-130, 2018 WL 6012368 (E.D. Va. Nov. 16, 2018), filed post-trial motions to set aside their § 924(c) convictions, arguing, inter alia, that their VICAR murder and VICAR attempted murder convictions were not crimes of violence under the force clause of § 924(c)(3)(A). Id. at *1. Judge Mark S. Davis of the Eastern District of Virginia "concluded with little analysis needed that 'generic' murder

constitutes a 'crime of violence' under the § 924(c)(3)(A) force clause." Id. at *2. Summarizing his prior oral rulings, Judge Davis stated:

> The Court then considered murder as punished under the cross-referenced Virginia statute, noting that the Court interpreted the law as requiring it to consider the elements of such state law crime in order to ensure that the federal VICAR murder offenses at issue are proper predicate violent crimes that could support a conviction under § 924(c) (3) (A). Umana, 229 F. Supp. 3d at 395. In analyzing Virginia's murder statute, Va. Code § 18.2-32, this Court concluded that all violations of such statute require the use, attempted use, or threatened use of physical force against another, thereby concluding that a violation of Va. Code § 18.2-32 satisfies the violent force requirement of § 924(c)(3)(A).
>
> To the extent that the Court failed to clearly state on the record that its analysis of Virginia law leads to the conclusion that VICAR murder, as cross-referenced to Virginia law, is itself a "crime of violence" under § 924 (c)(3)(A), the Court expressly makes such finding now. Stated differently, in concluding that all violations of § 18.2-32 require a malicious killing, committed through the application of violent force, the Court finds that the elements of Virginia murder are consistent with the elements of "generic" murder, to include first degree murder by starvation, and second degree murder committed with the degree of "malice" necessary to distinguish murder from manslaughter under Virginia law. Essex v. Com., 228 Va. 273, 280–81, 322 S.E.2d 216, 219-20 (1984); see Umana, 229 F. Supp. 3d at 394–97. Such finding leads to the conclusion that each federal VICAR murder conviction in this case is itself a "crime of violence" under the force clause set forth in § 924(c) (3) (A).
>
> For the same reasons, the federal VICAR attempted murder counts for which a guilty verdict was returned in this case are "crimes of violence" under the force clause set forth in § 924(c)(3)(A) (requiring the predicate crime to have, "as an element the use, attempted use, or threatened use of physical force against the person or property of another"). Accordingly, the Court reaffirms its oral **DENIALS** of Defendants' challenges to all of the § 924(c) convictions in this case for which the jury found that the firearm used in furtherance of murder or attempted murder, which applies to all § 924(c) convictions other than Count 30.

Id. at *2–3.

As recently as this past January, Judge Leonie M. Brinkema of the Eastern District of Virginia declined to vacate a § 924(c) conviction, holding that "the predicate crime—aiding and abetting an attempted murder—qualifies as a crime of violence under the force clause, § 924(c)(3)(A)." Portocarrero v. United States, No. 1:10-cr-00066-1(LMB), 2019 WL 181119, at *7 (E.D. Va. Jan. 11, 2019). Judge Brinkema reasoned:

> The crime of murder requires, as an element, that a violator of the statute use force, attempt to use force, or threaten to use force. The Fourth Circuit has held that one cannot commit federal murder "without a use of physical force capable of causing physical pain or injury to another." In re Irby, 858 F.3d 231, 238 (4th Cir. 2017). In addition, murder as defined by Virginia Code § 18.2-32 has been found to constitute a crime of violence pursuant to the force clause of § 924(c). See United States v. Cuong Gia Le, 206 F. Supp. 3d 1134, 1148 (E.D. Va. 2016) (discussing how "it does not matter ... that the harm occurs indirectly, rather than directly" (citing United States v. Castleman, 572 U.S. 157, 171 (2014))). Therefore, murder, whether defined under federal law or Virginia law, has as an element the use, attempted use, or threat of use of force. See United States v. Simmons, No. 2:16cr130, 2018 WL 6012368, at *2 (E.D. Va. Nov. 16, 2018) ("To the extent that the Court failed to state on the record that its analysis of Virginia law leads to the conclusion that VICAR [Violent Crimes in Aid of Racketeering] murder, as cross-referenced to Virginia law, is itself a 'crime of violence' under § 924(c)(3)(A), the Court expressly makes such finding [sic] now."). This conclusion, that the killing of another necessarily involves violence, should be uncontroversial.

Id.

Defendants have not cited, and the court has not located, any cases holding that the crime of murder or attempted murder under Virginia law falls outside the force clause of § 924(c)(3)(A). Consistent with the reasoning of the federal courts in Virginia in Mathis, Cousins, Cuong Gia Le, Simmons, and Portocarrero, the court rejects the argument raised by

defendants that murder, whether defined generically or as set forth in Va. Code § 18.2-32, is not a crime of violence for the purposes of § 924(c)(3)(A). These decisions are bolstered by the Fourth Circuit's focus in Battle on the crucial role mens rea plays in the force analysis as articulated in Castleman. Battle, 927 F.3d at 166-167. Again, "[f]ollowing Castleman, it is impossible to intend to cause death without physical force." Id. at 167.

Defendants' motions to dismiss the § 924(c) counts based on Virginia murder and attempted murder for failing to state an offense are **DENIED.**

IV.

The second issue to be addressed is whether the Virginia brandishing statute may serve as a VICAR predicate. Section 1959 makes it a crime for any person, as a member of a RICO enterprise engaged in racketeering activity, to commit a proscribed act of violence in order to maintain or increase his position in the enterprise. 18 U.S.C. § 1959(a). In order to establish a VICAR violation, "the government must prove that: (1) there was a RICO enterprise; (2) it was engaged in racketeering activity as defined in RICO; (3) the defendant in question had a position in the enterprise; (4) the defendant committed the alleged crime of violence; and (5) his general purpose in so doing was to maintain or increase his position in the enterprise." United States v. Zelaya, 908 F.3d 920, 926-27 (4th Cir. 2018) (citing United States v. Fiel, 35 F.3d 997, 1003 (4th Cir. 1994)). The fourth element is the key conduct element in determining if the VICAR offense has as an element the use, attempted use, or threatened use of physical force.

At issue in the pending motions are the VICAR assault with a dangerous weapon charges. As noted, the indictment charges that the VICAR assault with a dangerous weapon

were committed in violation of Va. Code § 18.2-282, Virginia's misdemeanor brandishing statute. The indictment does not cross reference Virginia's malicious wounding, use or display of a firearm in committing a felony, or assault statutes. See Va. Code §§ 18.2-51, 18.2-53.1, and 18.2-57. In such a situation, the court must "compare the elements of the statute forming the basis of the defendant's [charge or] conviction with the elements of the "generic" crime, i.e., the offense as commonly understood." Descamps v. United States, 570 U.S. 254, 257 (2013). "If the generic crime is a 'crime of violence,' [the cross-referenced state statute] will also qualify as a 'crime of violence' if the statute's elements are substantially the same or narrower than those in the generic crime." Umana v. United States, 229 F. Supp. 3d 388, 392 (W.D. N.C. 2017). "If the state statute is broader, and is applied to capture non-violent conduct, the [charge] in question cannot serve as the predicate [VICAR] 'crime of violence' regardless of whether the defendant's actual conduct violates the generic form of the offense.' Simmons, 2018 WL 6012368, at *10.

"At common law, 'assault' had two meanings, one being criminal assault, which is an attempt to commit a battery, and the other being tortious assault, which is an act that puts another in reasonable apprehension of immediate bodily harm." United States v. Guilbert, 692 F.2d 1340, 1343 (11th Cir. 1982). "[A]n assault is committed by either a willful attempt to inflict injury upon the person of another, or by a threat to inflict injury upon the person of another which, when coupled with an apparent present ability, causes a reasonable apprehension of immediate bodily harm." United States v. Dupree, 544 F.2d 1050, 1051 (9th Cir. 1976). The most analogous federal statute is 18 U.S.C. § 113, prohibiting assaults within maritime or territorial jurisdiction. An "assault" within the meaning of § 113 "is any intentional

and voluntary attempt or threat to do injury to the person of another, when coupled with the apparent present ability to do so sufficient to put the person against whom the attempt is made in fear of immediate bodily harm," United States v. LeCompte, 108 F.3d 948, 952 (8th Cir. 1997), as well as any attempt to intentionally use unlawful force against another person, regardless of whether the victim "experienced reasonable apprehension of immediate bodily harm." Guilbert, 692 F.2d at 1343.

The government argues that the VICAR predicate referenced in Counts 4, 8, 14 and 18, Va. Code § 18.2-282, substantially tracks the common law definition of assault with a dangerous weapon. Defendants disagree, arguing that the referenced Virginia misdemeanor brandishing statute prohibits conduct beyond that encompassed within the generic definition of assault with a deadly weapon.

Virginia law supports defendants' argument, particularly as regards the mens rea requirement. The Virginia Supreme Court has held that the Virginia brandishing statute has two elements: "(1) pointing or brandishing a firearm, and (2) doing so in a manner as to reasonably induce fear in the mind of the victim." Kelsoe v. Commonwealth, 226 Va. 197, 198, 308 S.E.2d 104 (1983). "'Brandish' means 'to exhibit or expose in an ostentatious, shameless, or aggressive manner.'" Morris v. Commonwealth, 269 Va. 127, 135, 607 S.E.2d 110, 114 (2005) (quoting Webster's Third New International Dictionary, 268 (1993)).

In Huffman v. Commonwealth, 51 Va. App. 469, 658 S.E.2d 713 (Va. App. 2008), defendant was convicted of brandishing in violation of § 18.2-282 when the victim simply observed the defendant waiving a handgun in the air and then asked the defendant to put it away. Id., 51 Va. App. at 474, 658 S.E.2d at 715. Although defendant had not attempted to or

threatened to use force against the victim, his conduct was sufficient to support a conviction under § 18.2-282. Likewise, in Dezfuli v. Commonwealth, 588 Va. App. 1, 10, 707 S.E.2d 1, 6 (Va. App. 2011), the Court of Appeals of Virginia held that § 18.2-282 is not a lesser included offense of "use of a firearm in the commission of a felony" in violation of Virginia Code § 18.2-53.1 because in showing the latter, "the Commonwealth must prove that the defendant used or threateningly displayed the firearm expressly to assist him in attempting or completing a specified underlying criminal act," but the former requires proving only that the defendant "'pointed, held or brandished' a firearm in a manner that reasonably induced fear in the mind of some nearby person." 58 Va. App at 10, 707 S.E.2d at 6. The government need not "prove the defendant displayed his firearm 'in a threatening manner' to obtain a conviction for brandishing a firearm under Code § 18.2-282." Id., 58 Va. App. at 11, 658 S.E.2d at 6.

Because the Virginia brandishing statute makes it unlawful to engage in a display of a firearm in a manner so as to reasonably induce fear in another, and does not require proof of an intent to threaten or cause harm to another, it is broader than, and does not correspond in substantial part to, generic assault. As such, Va. Code § 18.2-282 cannot serve as a VICAR predicate.

This conclusion is consistent with the reasoning of the Eastern District of Virginia in Simmons, where the court stated that "[i]n this Court's view, Va. Code § 18.2-282, a misdemeanor brandishing crime, appears broader than generic assault with a dangerous weapon, and more importantly to the instant case, it does not have the use or threatened use of violent force as an element." 2018 WL 6012368, at *9. The court rejected the argument made by the government here that the elements of Va. Code § 18.2-282 "correspond in

substantial part" to the elements of generic assault with a dangerous weapon, reasoning as follows:

> While this Court agrees that the brandishing "label" on the state law crime is irrelevant, and further agrees that the elements of the state law crime need not perfectly align with the generic elements, the Supreme Court has clarified (in the analogous ACCA context) that, when comparing the elements of a generically listed federal crime and a specific state statute, the key consideration is whether the state statute "sweeps more broadly than the generic crime." Descamps, 570 U.S. at 260-61. If the state statute is broader, and is applied to capture non-violent conduct, the conviction in question cannot serve as the predicate § 924(c) "crime of violence" regardless of whether the defendant's actual conduct violates the generic form of the offense.
>
> Here, the Court finds that Va. Code § 18.2-282 sweeps more broadly than generic assault with a dangerous weapon because the most innocent conduct that has actually been prosecuted under Va. Code § 18.2-282 does not involve the use of violent force or the threat to use violent force, as the firearm does not need to be displayed with either the intent to harm or the intent to scare another person, but rather, can be waived in the air in a manner that is reasonably perceived as being dangerous.

Id. at *10.[6]

Accordingly, defendants' motion to dismiss VICAR counts predicated upon Va. Code § 18.2-282 is **GRANTED**, and Counts 4, 8, 14, and 18 of the Superseding Indictment are **DISMISSED**.

[6] While the 2004 decision of the Eastern District of Virginia in United States v. Cuong Gia Le, 316 F. Supp. 2d 355 (E.D. Va. 2004), reached a contrary result regarding the Virginia brandishing statute, that case was decided before the decisions of the Virginia Court of Appeals in Dezfuli and Huffman. Moreover, while the mode of analysis employed herein differs somewhat from that of the court's earlier opinion in United States v. Jones, No. 7:16-cr-30026, 2017 WL 3725632 (Aug. 29, 2017), the analytical approach of focusing on the elements of the underlying state statute employed herein would not change the result in Jones as the underlying state law violation was for malicious wounding in violation of Va. Code § 18.2-51, plainly a crime of violence. See United States v. Jenkins, 719 Fed. Appx. 241 (4th Cir. 2018).

V.

For these reasons, the government's motion to dismiss Counts 5, 9, 15, and 19 without prejudice, ECF No. 490, is **GRANTED**. ECF Nos. 457, 460, and 461 are **DENIED as moot**.

Defendants' motions to dismiss § 924(c) counts based upon Virginia murder and attempted murder, ECF Nos. 342, 349, 351, 355, 356, 358, 361, and 362, are **DENIED**. As such, the motions to dismiss Counts 3, 7, 11, 13, and 17 are **DENIED**.

Defendants' motions to dismiss counts alleging VICAR assault with a dangerous weapon, predicated on the Virginia brandishing statute, ECF Nos. 355, 358, and 363, are **GRANTED**. Counts 4, 8, 14, and 18 are **DISMISSED**.

An appropriate Order will be entered.

Entered: 07-22-2019

/s/ Michael F. Urbanski

Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	Case No.: 4:18-cr-00011
v.	)	
	)	
	)	
MARCUS JAY DAVIS, et al.,	)	
	)	By: Michael F. Urbanski
Defendants.	)	Chief United States District Judge

ORDER

This matter comes before the court on numerous motions to dismiss specific counts in the First Superseding Indictment. For the reasons explained in the accompanying Memorandum Opinion, the court rules as follows:

The government's motion to dismiss Counts 5, 9, 15, and 19 without prejudice, ECF No. 490, is **GRANTED**. Thus, to the extent ECF Nos. 342, 349, 351, 357, 359, and 361 seek dismissal of these counts, these motions are **GRANTED in part**. ECF Nos. 457, 460, and 461 are **GRANTED**.

Defendants' motions to dismiss § 924(c) counts based upon Virginia murder and attempted murder are **DENIED**. Thus, to the extent that defendants' motions ECF Nos. 342, 349, 351, 357, 359, and 361 seek dismissal of Counts 3, 7, 11, 13 or 17, these motions are **DENIED in part**.

Defendants' motions to dismiss the Violent Crimes in Aid of Racketeering ("VICAR") Assault with a Dangerous Weapon counts based on the Virginia misdemeanor

brandishing statute are **GRANTED**. Thus, ECF Nos. 355, 358, and 362 are **GRANTED**. Counts 4, 8, 14 and 18 are **DISMISSED**.

ECF No. 348 is **DENIED as moot.**

It is so **ORDERED**.

Entered: 07-22-2019

/s/ Michael F. Urbanski

Michael F. Urbanski
United States District Judge