
NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DECEMBER TERM, 2017

Ricky Ernest Peeples - Petitioner,

vs.

United States of America - Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether *United States v. Castleman*, 134 S. Ct. 1405 (2014), compels a conclusion that a failure to act (i.e., an omission) can qualify as the “use, attempted use, or threatened use of physical force” within the meaning of § 4B1.2(a)(1), or whether *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), and *Johnson v. United States*, 559 U.S. 133 (2010), compel a contrary conclusion.

(2) Whether a state statute can be said to require the “use, attempted use, or threatened use of physical force” within the meaning of USSG § 4B1.2(a)(1) when the statute is indivisible and can be violated by an action that is incapable of causing physical pain or injury to another person, as required by *Johnson v. United States*, 559 U.S. 133 (2010).

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Ricky Ernest Peeples, through counsel, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 16-4039, entered on January 2, 2018. Mr. Peeples' petition for rehearing en banc and petition for rehearing by the panel were denied on February 8, 2018.

OPINION BELOW

On January 2, 2018, a panel of the Eighth Circuit Court of Appeals entered its ruling affirming the judgment of the United States District Court for the Northern District of Iowa. The decision is published and available at 879 F.3d 282 (8th Cir. 2018).

JURISDICTION

The Court of Appeals entered its judgment on January 2, 2018, and denied Mr. Peeples' petition for rehearing en banc and petition for rehearing by the panel on February 8, 2018. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Iowa Code § 707.11 (1991)

A person commits a class "B" felony when, with the intent to cause the death of another person and not under any circumstances which would justify the person's actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of another person.

It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and the actor's expectations were not unreasonable in light of the facts known to the actor.

Iowa Code § 702.2 (1991)

The term "act" includes a failure to do any act which the law requires one to perform.

STATEMENT OF THE CASE

Mr. Peeples was indicted in the Northern District of Iowa on one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. §§ 922(g)(1) & 924(a)(2) (2012). (DCD 2).¹ The district court had jurisdiction

¹ In this petition, the following abbreviations will be used:
"DCD" - district court clerk's record, followed by docket entry and page number, where noted;

pursuant to 18 U.S.C. § 3231. Mr. Peeples pled guilty to the sole count of the indictment, although only to the “ammunition” component of the offense. (DCD 23; PSR, p. 3 n.1).

As relevant to this petition, the presentence investigation report (“PSR”) prepared in advance of sentencing indicated that Mr. Peeples’ base offense level should be increased because he had a prior felony conviction for a crime of violence: Iowa attempted murder. (PSR ¶¶ 11, 35); USSG § 2K2.1(a)(4)(A) (2015). After other enhancements, the PSR calculated Mr. Peeples’ guideline range at 57–71 months of incarceration, based on a total offense level of 21 and criminal history category IV. (PSR ¶ 98).

Mr. Peeples objected to the PSR’s increase to his base offense level. (DCD 32). In particular, he asserted that under the 2015 Sentencing Guidelines in effect at the time he committed the instant offense, his 1991 Iowa attempted murder conviction could only have qualified as a crime of violence under the “force clause” definition in USSG § 4B1.2(a)(1). (DCD 32). He argued that because a person could violate the Iowa attempted murder statute by “any act,” the offense was categorically overbroad because it did not have as a necessary element the “use, attempted use, or threatened use of physical force against the person of another.” (DCD 32). The district court overruled the objection to his base offense level.

“PSR” - presentence report, followed by the page number of the originating document and paragraph number, where noted; and

“Sent. Tr.” – Sentencing hearing transcript, followed by page number.

(Sent. Tr. p. 5). After upwardly departing based on other factors in the case, the court sentenced Mr. Peeples to 105 months of imprisonment. (Sent. Tr. pp. 21–22).

On appeal, Mr. Peeples maintained the challenge to his base offense level. The Court of Appeals had jurisdiction over Mr. Peeples’ appeal pursuant to 28 U.S.C. § 1291. As to his Iowa attempted murder conviction, Mr. Peeples continued to argue that the offense could not qualify as a crime of violence under the force clause because it was categorically overbroad.

Iowa Code § 707.11 (1991) provides:

A person commits a class “B” felony when, with the intent to cause the death of another person and not under any circumstances which would justify the person’s actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of another person.

It is not a defense to an indictment for attempt to commit murder that the acts proved could not have caused the death of any person, provided that the actor intended to cause the death of some person by so acting, and the actor’s expectations were not unreasonable in light of the facts known to the actor.

The term “act” is defined in Iowa Code § 702.2 as including “a failure to do any act which the law requires one to perform.” Mr. Peeples urged on appeal two primary ways in which the Iowa statute was overbroad. First, he argued that because factual impossibility was not a bar to conviction, the Iowa statute did not require “force that is *capable of* causing physical pain or injury to another person, as required by *Johnson*, 559 U.S. at 140 (emphasis added). Second, he argued that because an Iowa attempted murder conviction could be based on “a failure to do any

act,” i.e., an omission, it did not require as an element the use, attempted, or threatened use of physical force against the person of another, let alone the type of violent force required by the *Johnson* decision.

The Eighth Circuit rejected Mr. Peeples’ argument that his base offense level was improperly increased. *United States v. Peeples*, 879 F.3d 282 (8th Cir. 2018). The panel agreed that the statute was indivisible and could be violated by a failure to act, but specifically held that a failure to act, i.e., an omission, is sufficient to satisfy the requirement of USSG § 4B1.2(a)(1) that the prior conviction contain an element involving the “use or attempted use of force.” *Id.* pp. 286–87. The panel neither acknowledged nor analyzed Mr. Peeples’ argument that the Iowa statute is also overbroad because factual impossibility is not a bar to conviction, such that the statute does not require force that is capable of causing physical pain or injury to another person.

In holding that an omission qualifies as the “use or attempted use of force,” the panel relied on *United States v. Castleman*, 134 S. Ct. 1405, 1410, 1414 (2014), which held that Congress incorporated the common-law meaning of “force” – which includes indirect applications of force, such as sprinkling poison into a victim’s drink – into its definition of “misdemeanor crime of domestic violence” in 18 U.S.C. § 921(a)(33)(A). The Eighth Circuit noted that in *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016), it had interpreted *Castleman* as requiring a conclusion

that the indirect use of force was also sufficient to satisfy the force clause in USSG § 4B1.2(a)(i). *Peeples*, 879 F.3d at 287. The Eighth Circuit went on to conclude:

In line with these decisions, we hold that Iowa Code § 707.11 (1991) has as an element the use or attempted use of force. The phrase “any act by which the person expects to set in motion a force or chain of events” would include omissions as *Peeples* argues. However, the statute still requires the use of force, satisfying the violent force requirement under the Guidelines. In *Peeples*’s example of a caregiver refusing to feed a dependent, it is the act of withholding food with the intent to cause the dependent to starve to death that constitutes the use of force. *See Castleman*, 134 S. Ct. at 1415. It does not matter that the harm occurs indirectly as a result of malnutrition. *See id.* Because it is impossible to cause bodily injury without force, it would also be impossible to cause death without force. Thus, an attempt to cause death would also require the use or attempted use of force.

Peeples, 879 F.3d at 287. Based on its interpretation of *Castleman* in both *Rice* and Mr. *Peeples*’ case, the panel affirmed Mr. *Peeples*’ sentence.

REASONS FOR GRANTING THE WRIT

This Court should grant the petition for writ of certiorari for two reasons: (1) to address a significant circuit conflict; and (2) because the Eighth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. *See* S.C. Rule 10(a), (c). Below, the Eighth Circuit rejected the argument that Iowa’s attempted murder statute categorically fails to require as an element the use or attempted use of physical force because the statute can be violated by failing to act, i.e., by omission. The panel acknowledged that the Iowa statute is indivisible, but nonetheless interpreted *United States v. Castleman*, 134 S. Ct. 1405 (2014), as supporting a conclusion that a failure to act still requires the requisite level of violent force to qualify as a crime of violence under USSG § 4B1.2(a)(1). The Eighth Circuit’s erroneous interpretation of *Castleman* conflicts with the decisions of other Courts of Appeals, and with other Supreme Court cases such as *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), and *Johnson v. United States*, 559 U.S. 133 (2010).

In *Leocal*, 543 U.S. at 11, this Court clearly and unequivocally stated that, in the context of “crimes of violence,” the term “physical force . . . suggests a category of violent, *active* crimes[.]” (emphasis added). And in *Johnson*, 559 U.S. at 138, this Court held that the word “physical” in the phrase “physical force” “plainly refers to force exerted by and through concrete bodies – distinguishing physical force from for example, intellectual force or emotional force.” It further held that “physical force”

means “*violent* force –that is, force capable of causing physical pain or injury to another person. *Id.* In holding that an omission is the equivalent of an affirmative act for purposes of force clause analysis, the Eighth Circuit ignores these fundamental principles. Moreover, in reaching its conclusion, the Eighth Circuit has misconstrued and misinterpreted this Court’s decision in *Castleman*, dramatically expanding the case outside of the context in which it was decided, in a way that conflicts with applicable precedent.

The Second, Third, Fourth, Fifth, and Ninth Circuits have all rejected the notion that acts of omission involve the use of physical force for purposes of “crime of violence” force clause analysis. These courts have generally found that when no act is taken, there is no exertion of force by or through concrete bodies pursuant to *Johnson*, or even more simply, that the phrase “physical force” does not, by its plain meaning, encompass a failure to take any affirmative physical action whatsoever. However, the Eighth, Seventh, and Tenth Circuits have misinterpreted this Court’s *Castleman* decision as requiring a conclusion that a failure to act, i.e., an omission, can qualify as the use or attempted use of physical force. This Court should grant the petition for writ of certiorari to correct these Circuits’ flawed interpretations of this Court’s precedent.

This Court should additionally grant the petition for certiorari because the Eighth Circuit entirely failed to acknowledge or analyze Mr. Peebles’ meritorious argument that the Iowa statute is overbroad because it can be violated in a way

that does not involve “force *capable of* causing physical pain or injury to another person,” as required by *Johnson*, 559 U.S. at 140 (emphasis added). Both the plain language of the Iowa statute and Iowa case law establish that factual impossibility is not a defense to an Iowa attempted murder conviction. This means that an overt act can result in an Iowa attempted murder conviction even if such act was, in fact, incapable of causing pain or injury to another person.

**I. A FAILURE TO ACT DOES NOT CONSTITUTE THE USE OR
ATTEMPTED USE OF PHYSICAL FORCE WITHIN THE MEANING
OF USSG § 4B1.2(a)(1).**

**A. The Eighth Circuit’s holding that a failure to act, i.e., an omission,
can constitute the “use, attempted use, or threatened use of
physical force against the person of another” incorrectly
interprets, and is contrary to, established U.S. Supreme Court
precedent.**

Several provisions of federal law contain a “force clause” that is nearly identical to the force clause in USSG § 4B1.2(a)(1), defining “crimes of violence” and “violent felonies” as offenses that have “as an element the use, attempted use, or threatened use of physical force against the person of another.” *See, e.g.*, 18 U.S.C. §§ 16(a), 924(c), 924(e) (the “ACCA”). The Supreme Court has clarified the meaning of the force clause’s terms on multiple occasions, and lower courts have routinely found that its guidance largely applies interchangeably among the various provisions that define “violent felony” or “crimes of violence.”

In *United States v. Castleman*, the Supreme Court evaluated whether a Tennessee statute criminalizing domestic assault was a “misdemeanor crime of

domestic violence” under 18 U.S.C. § 922(g), which is defined by 18 U.S.C. § 921(a)(33)(A)(ii) as an offense that “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon” *Castleman*, 134 S. Ct. at 1409. Although the “force clause” at issue in *Castleman* was similar to the force clauses in USSG § 4B1.2, and 18 U.S.C §§ 16(b), 924(c), and 924(e), the majority held that in the specific context of § 921(a)(33)(A)(ii), Congress intended the term “force” to have its common-law meaning, which includes indirect uses of force, such as sprinkling poison in the victim’s drink, reasoning that “it is impossible to cause bodily injury without applying force in the common-law sense.” *Id.* at 1415. In so holding, the Court recognized that the common-law definition of force applicable in the “misdemeanor crime of domestic violence” context did *not* apply to – and indeed was a “comical misfit” with – provisions such as the ACCA and the Sentencing Guidelines, which use similar language to define “violent felonies” and “crimes of violence.” *Id.* at 1410. In such provisions, the words “violent” and “violence” “connote a substantial degree of force,” and require a conclusion that “‘physical force’ must ‘mea[n] *violent* force.’” *Id.* at 1411–12, 1414 (quoting *Johnson*, 559 U.S. at 140).

Despite the *Castleman* Court’s clear statement that it was applying the common-law definition of force specifically to the definition of “misdemeanor crime of domestic violence,” the Eighth Circuit Court of Appeals has now twice expanded *Castleman*’s reasoning to the Sentencing Guidelines’ force clause. First, in *United*

States v. Rice, 813 F.3d 704, 706 (2016), the Eighth Circuit examined whether a conviction for Arkansas second-degree battery – which prohibited “intentionally or knowingly . . . caus[ing] physical injury” to specified persons – qualified as a “crime of violence” under the Sentencing Guidelines. In a 2-1 decision, the Eighth Circuit found that *Castleman* resolved the issue, holding that “Rice’s conviction includes the use of violent force as an element ‘since it is impossible to cause bodily injury without using force “capable of” producing that result.”’ *Rice*, 813 F.3d at 706 (quoting *Castleman*, 134 S. Ct. at 1416–17 (Scalia, J., concurring)). The Court of Appeals explicitly rejected Rice’s argument that a person could commit Arkansas second degree battery “without using physical force, for example, by offering his victim a poisoned drink,” stating:

We believe that *Castleman* resolves the question before our court, however, because there the Court held that even though the act of poisoning a drink does not involve physical force, “the act of employing poison knowingly as a device to cause physical harm’ does.” *Castleman*, 134 S. Ct. at 1415. The Court explained, “[t]hat the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter,” because otherwise “one could say that pulling the trigger on a gun is not a ‘use of force’ because it is the bullet, not the trigger, that actually strikes the victim.

Id. at 706.

In Mr. Peeples’ case, the Eighth Circuit dramatically and erroneously expanded *Rice*’s interpretation of *Castleman*. *Peeples*, 879 F.3d at 287. It held that even though the Iowa attempted murder statute was indivisible and could be violated by omissions, an omission made with the intent to cause death “still

requires the use of force, satisfying the violent force requirement under the guidelines.” *Id.* Using the example of a caregiver that declines to feed a dependent, the Eighth Circuit summarily reasoned as follows: “It does not matter than the harm occurs indirectly as a result of malnutrition. Because it is impossible to cause bodily injury without force, it would also be impossible to cause death without force. Thus, an attempt to cause death would also require the use or attempted use of force.” *Id.* (citing *Castleman*, 134 S. Ct. at 1415).

A strong argument can be made that the Eighth Circuit’s interpretation of *Castleman* in its *Rice* decision was erroneous. As the dissenting judge recognized, the *Castleman* Court’s review was limited to the unique context of domestic violence; it could not have implicitly resolved the question of whether a particular crime involves “*violent* force” under the Sentencing Guidelines because “the majority opinion [in *Castleman*] explicitly reserved” that question. *See Rice*, 813 F.3d at 707 (Kelly, J., dissenting) (citing *Castleman*, 134 S. Ct. at 1414). Regardless of whether *Rice* was correctly decided, however, its interpretation of *Castleman* is clearly erroneous in the context of Mr. Peeples’ case; indeed, the Eighth Circuit’s interpretation of *Castleman* directly conflicts with other Supreme Court precedent when applied to Iowa’s attempted murder statute, which indisputably can be violated by taking no action at all, i.e., by omission.

First, the panel erred by concluding that an omission is the equivalent of an affirmative physical act. In *Leocal*, 543 U.S. at 11, the Supreme Court held that 18

U.S.C. § 16(a)’s “emphasis on the use of physical force against another person . . . suggests a category of violent, active crimes[.]” Citing this very language, the Supreme Court held in *Johnson*, 559 U.S. 133 at 140, that the phrase “physical force” in 18 U.S.C. § 924(e)(2)(B)(i) (the “ACCA”) requires “*violent* force – that is, force capable of causing physical pain or injury to another person.” The *Johnson* Court further found that the word “physical” in the phrase “physical force” in the ACCA definition of “violent felony” “plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” 559 U.S. at 138. The Court reemphasized the applicability of these principles to “crime of violence” analysis in *Castleman*. See 134 S. Ct. at 1414 & n.4.

Applying the principles of *Leocal* and *Johnson* to crimes committed by omission makes clear the errors in the Eighth Circuit’s analysis. Certainly sprinkling poison in an unsuspecting victim’s drink employs a “concrete body” as required by *Johnson* – the poison – which then indirectly causes harm. As well, sprinkling poison is an “active” crime under *Leocal*, as it requires the perpetrator to take some sort of affirmative act for its occurrence. By contrast, omission (i.e., *not* taking an action) involves no affirmative act and cannot be considered an “active” crime. And while *not* taking an action can certainly cause harm indirectly, there is still no “concrete body” being employed to exert force. Stated another way, “when the act has been one of omission, . . . there has been no force exerted by and through

concrete bodies,’ and thus, physical force as defined in *Johnson* has not been used.” *United States v. Oliver*, No. 17-2747, 2018 WL 1547595, at *3 (3d Cir. Mar. 29, 2018) (quoting *United States v. Harris*, 205 F. Supp. 3d 651, 671 (M.D. Pa. 2016)).

In his *Castleman* concurrence, Justice Scalia argued that bodily injury necessarily results from a use of “violent force,” but rejected a proposed definition of “domestic violence” that would have included what he called a “wide range of nonviolent and even *nonphysical* conduct . . . that cannot possibly be relevant to the meaning of a statute requiring ‘physical force.’” *Castleman*, 134 S. Ct. at 1421 (Scalia, J., concurring, emphasis in original). One example of “nonphysical conduct” given by Justice Scalia was “acts of omission.”² *Id.* Nonetheless, the panel decision equates nonphysical acts of omission with affirmative physical acts to support a conclusion that Iowa attempted murder is a crime of violence, in direct conflict with *Johnson*, *Leocal*, and *Castleman* itself.

B. The Eighth Circuit’s decision conflicts with the Second, Third, Fourth, Fifth, and Ninth Circuits. Only the Seventh and Tenth Circuits agree that crimes that can be perpetrated through omission qualify as “crimes of violence” under the force clause.

² An additional point is worth mentioning in light of Justice Scalia’s reference in *Castleman* to nonphysical conduct and *Johnson*’s statement that the term “physical [force] . . . plainly refers to force exerted by and through concrete bodies – distinguishing physical force from, for example, intellectual force or emotional force.” 559 U.S. at 138. Because a person can be convicted of Iowa attempted murder by committing “any act” that he believes will put in motion a chain of events resulting in death, it appears clear that not only omissions, but also intellectual or emotional manipulations of the victim would suffice. For instance, a person could manipulate his victim into voluntarily drinking a toxic substance, touching an electrified fence, or playing Russian roulette without disclosing that all chambers of the firearm are loaded. These types of nonphysical acts would not qualify as omissions, per se, but further demonstrate the overbreadth of both the Iowa attempted murder statute and the panel’s decision.

Only two Courts of Appeal appear to have adopted a similar position to that of the Eighth Circuit, although neither decision contained any significant substantive analysis. *See United States v. Ontiveros*, 875 F.3d 533, 538 (10th Cir. 2017) (relying on *Castleman* to reason, *in toto*, that if it is “impossible to commit a battery without applying force, and a battery can be committed by an omission to act, then [Colorado] second-degree assault must also require physical force”); *United States v. Waters*, 823 F.3d 1062, 1066 (7th Cir 2016) (summarily concluding that “withholding medicine causes physical harm, albeit indirectly, and thus qualifies as a use of force under *Castleman*”). By contrast, several circuits have rejected the position taken by the Eighth Circuit and held that crimes that can be committed by omission do not involve the use, attempted use, or threatened use of physical force. The panel’s holding thus conflicts with the Second, Third, Fourth, Fifth, and Ninth Circuits.

In a recent decision, the Third Circuit explicitly rejected the Eighth Circuit’s holding in *Peeples* and the Seventh Circuit’s decision in *Waters*. In *United States v. Oliver*, No. 17-2747, 2018 WL 1547595, at *3, (3d Cir. Mar. 29, 2018), the Third Circuit held that, under the binding definition in *Johnson*, “physical force is not used when no act is done[.] when the act has been one of omission, . . . there has been no force exerted by and through concrete bodies.” (quotation marks and citations omitted). According to the Third Circuit, the Eighth and Seventh Circuits’

conclusions to the contrary “conflate indirect force, which *Castleman* held was sufficient to satisfy the use of force, with omissions.” *Id.* at *3 n.7.

The Fifth Circuit recently reiterated its long held position that an offense is categorically not a crime of violence where the statute is indivisible and can be violated by “both acts and omissions.” *United States v. Martinez-Rodriguez*, 857 F.3d 282, 286 (5th Cir. 2017) (citing *United States v. Gracia-Cantu*, 302 F.3d 308, 310, 312–13 (5th Cir. 2002)). Likewise, in finding that a North Carolina involuntary manslaughter conviction could not qualify as a crime of violence under the Guidelines’ force clause, the Ninth Circuit stated that, “[l]ogically, one cannot use, attempt to use, or threaten to use force against another in failing to do something.” *United States v. Trevino-Trevino*, 178 F. App’x. 701, 703 (9th Cir. May 4, 2006). The Second and Fourth Circuits have similarly declined to find that crimes that can be committed by omission qualify as crimes of violence. *See United States v. Gomez*, 690 F.3d 194, 201 (4th Cir. 2012) (recognizing that a statute “does not require the use of physical force” where it could be violated by “committing an affirmative act or by neglecting to act, neither of which necessarily requires the use of physical force”); *Canada v. Gonzales*, 448 F.3d 560, 569 (2d Cir. 2006) (finding that an offense is “not a crime of violence because it includes ‘passive conduct or omissions’ which result in death, and therefore, the statute ‘encompasses many situations in which the defendant applies no physical force to the victim’”); *see also United States v. Scott*, No. 06cr988-LTS, 2017 WL 2414796, at *2 (S.D.N.Y. June 2,

2017) (finding that an offense was not a crime of violence because it could be committed by omission and rejecting the notion that *Castleman* compels a different result because the “*Castleman* Court did not address inaction at all”); *United States v. Fisher*, No. 01-769-01, 2017 WL 1426049, at *6–7 (E.D. Pa. Apr. 21, 2017) (finding a state offense could not qualify as a crime of violence because the offense “can be committed by an act of omission”); *United States v. Harris*, 205 S. Supp. 3d 651, 671 (M.D. Pa. 2016) (rejecting the argument that an omission qualifies as a use of force: “The *Castleman* reasoning deals with affirmative acts leading to the indirect use of force, but does not resolve whether acts of omission could also lead to the indirect use of force . . . [b]ut it cannot be said that physical force has been used when no act has been performed”); *United States v. Cruz-Rivera*, No. 15-cr-486, 2015 WL 6394416, at *4 (D.P.R. Oct. 21, 2015) (recognizing that acts of omission do not involve the use of physical force).

II. THE IOWA ATTEMPTED MURDER STATUTE IS CATEGORICALLY OVERBROAD BECAUSE IT CAN BE VIOLATED BY AN AFFIRMATIVE ACT THAT IS NOT CAPABLE OF CAUSING PAIN OR INJURY

The Eighth Circuit’s panel decision focused its analysis solely on whether a failure to act, i.e., an omission, can constitute a use or attempted use of force within the meaning of USSG § 4B1.2(a)(1). The panel entirely ignored, however, Peeples’ argument that the Iowa statute can *also* be violated by committing an overt act that is *incapable* of causing physical pain or injury to a victim. By failing to acknowledge or analyze Mr. Peeples’ argument in this regard, the Eighth Circuit

implicitly overruled it, and deprived Mr. Peeples of a viable avenue whereby he could demonstrate that his prior conviction failed to qualify as a crime of violence under the Sentencing Guidelines' force clause.

A conviction under Iowa's attempted murder statute requires proof of only two elements: (1) "a specific intent to cause the death of another"; and (2) "an overt act in furtherance of the required specific intent." *State v. Young*, 686 N.W.2d 182, 185 (Iowa 2004)³; *see also* Iowa Crim. Jury Ins. 700.19. The second paragraph of the statute, however, explicitly provides that it "is not a defense . . . that the acts proved *could not have* caused the death of any person." Iowa Code § 707.11 (emphasis added). Consistent with this provision, the Iowa Supreme Court has recognized that the words "'will cause' [in § 707.11] refer[] to the actor's expectation of the consequences of his or her act, not the probability of the act's success." *Young*, 686 N.W.2d at 185. The *Young* court further acknowledged that "factual impossibility or probability of success is utterly irrelevant" to the analysis. *Id.* at 186. In support of this holding, the court favorably cited several examples from other jurisdictions where attempted murder convictions were upheld despite the fact that the overt act committed by the defendant could not *possibly* have resulted in bodily injury to or the death of the intended victim. For instance, in *People v. Ng*, 402 N.W.2d 500, 504 (Mich. 1986), a defendant was convicted of attempted murder when he mailed a

³ The substantive portions of Iowa's attempted murder statute have remained identical to the 1991 version of the statute. *Compare e.g.*, Iowa Code § 707.11 (1991) *and* Iowa Code § 707.11 (2016).

defective bomb to the intended victim; and in *State v. Damms*, 100 N.W.2d 592, 594–96 (Wis. 1960), an attempted murder conviction was upheld where the defendant fired an unloaded gun at the victim believing it was loaded. See *Young*, 686 N.W.2d at 185 (collecting cases). Similarly, the commentary to the Model Penal Code explains that an attempt to kill by incantation is punishable as attempted murder so long as the actor believes the incantation will result in the victim’s death. *Model Penal Code*, § 5.05(2), Part 1 commentaries at 490–91 (1985) (“[L]iability [is] focused upon the circumstances as the actor believes them to be rather than as they actually exist.”).

To be considered a crime of violence under the force clause using the categorical approach, *Johnson* requires that the crime of conviction contain an element requiring “force that is *capable of* causing physical pain or injury to another person.” *Johnson*, 559 U.S. at 140 (emphasis added). Iowa’s attempted murder statute and case law interpreting it, however, make clear that a person can be convicted of attempted murder even though the force used by a defendant is *not* capable of causing physical pain or injury. For instance, using an example cited in *Young*, a person who shoots at a house with an unloaded gun could be convicted of Iowa attempted murder so long as he intended to cause the death of a person in the home when he did so. Yet, it is axiomatic that pulling the trigger on an unloaded firearm is simply not an act that is “*capable of*” causing physical pain or injury to another person, as required by *Johnson*.

The unpublished district court opinion in *United States v. Ramirez-Gonzalez*, No. 5:14-cr-00407-BLF, 2016 WL 3670045, at *8 (N.D. Cal. July 11, 2016), elucidates the problem with Iowa’s attempted murder statute. There, the defendant argued that California’s assault with caustic chemicals statute did not qualify as a crime of violence under the force clause because the statute encompassed assaults using extremely diluted chemicals that were incapable of injuring a victim. *Id.* The government argued that under *Castleman*, the offense still qualified as the use of physical force, because the defendant had to act “with the intent to injure or disfigure,” i.e., even if the “defendant is mistaken about the strength of the [chemical used in the assault], then he or she has still attempted to use force against the victim.” *Id.* The district court rejected the government’s argument, concluding that the problem with the statute was that it criminalized “conduct such as throwing acid so diluted that it is incapable of causing injury, so long as the defendant does so with the intention of injuring or disfiguring the victim.” *Id.* Stated another way, acting with the *intent* to commit a violent physical act is not enough; *Johnson* requires that the act committed must involve the use, attempted use, or threatened use of force that is actually “capable of causing pain or injury to another person.” *Id.*; see also *United States v. Taylor*, 848 F.3d 476, 492 (1st Cir. 2017) (“A tap on the shoulder, of course, is not capable of causing physical pain or injury and so does not require violent force.”). Because Iowa’s attempted murder statute does not require the perpetrator to use or attempt to use force that is

actually capable of causing pain or injury, it categorically cannot qualify as a crime of violence.

CONCLUSION

For the foregoing reasons, Mr. Peeples respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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