NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAEKWON MALIK PATTON,

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 A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The first question presented, on which the circuits are divided, is:

Whether 18 U.S.C. § 1959(a) requires a minimum finding by the jury that the underlying crime was committed as a substantial purpose or integral aspect of membership in the enterprise.

The second question presented is:

Whether the Eighth Circuit misconstrued Iowa law in finding that there was no substantial basis for submission of justification as a defense to the jury in a federal prosecution that uses the Iowa crime of Attempt to Commit Murder as the underlying offense.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

United States v. Raekwon Patton, et al., United States District Court for the Southern District of Iowa, # 4:21-cr-00075 (judgment entered August 19, 2022).

United States v. Raekwon Malik Patton, United States Court of Appeals for the Eighth Circuit, No. 22-2784 *decided sub nomine United States v. Mallory*, 104 F.4th 15 (8th Cir. 2024) (opinion and judgment entered 317 , petition for rehearing denied July 16, 2024).

Co-defendants: *United States v. Austin James Mallory*, Eighth Circuit No. 22-2777; *United States v. Yuri Perren Green, Jr.*, Eighth Circuit No. 22-2801

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

The Petitioner, Raekwon Malik Patton, respectfully petitions for a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 22-2784.

OPINION BELOW

The opinion of the Court of Appeals appears at Appendix Pages A-1-A-10 and is reported as *United States v. Mallory*, 104 F.4th 15 (8th Cir. 2024).

JURISDICTION

The date on which the United States Court of Appeals decided the case was on June 12, 2024. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 16, 2024, and a copy of the order denying rehearing appears at Appendix Page C-1.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is timely under Rule of Supreme Court 13(1 & 3).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1959(a) states:

18 U.S.C. § 1959(a) provides:

> "(a) Whoever, ... 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 ..."

Iowa Code § 707.11(1) states:

> A person commits the offense of attempt to commit murder when, with the intent to cause the death of another person and not under 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 the other person.

Iowa Code § 704.1 states:

> 1. "Reasonable force" means that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety or the life or safety of another, or it is reasonable to believe that such force is necessary to resist a like force or threat.
>
> 2. A person may be wrong in the estimation of the danger or the force necessary to repel the danger as long as there is a reasonable basis for the belief of the person and the person acts reasonably in the response to that belief.
>
> 3. A person who is not engaged in illegal activity has no duty to retreat from any place where the person is lawfully present before using force as specified in this chapter.

Iowa Code § 704.3 states:

> A person is justified in the use of reasonable force when the person reasonably believes that such force is necessary to defend oneself or another from any actual or imminent use of unlawful force

STATEMENT OF THE CASE

A. Introduction. Section 18 U.S.C. § 1959(a) makes it a federal crime to commit certain state offenses, if the purpose is done to gain entrance to, maintain, or increase the person's position in an enterprise engaged in racketeering. The

important question in this case is concerns the scope of the use of state offenses as a part of federal criminal law. In particular, whether there is a minimum connection between the state criminal act and purpose element of the offense which must be proved by the Government.

At least one circuit has found that the purpose element for committing the underlying crime is only met if it is substantially done, or done as an integral aspect, of membership in the enterprise. It has incorporated that language into it's pattern instruction on the offense.

Other circuits has generally agreed with this finding. Here Mr. Patton requested this language in the jury instruction for this element. The trial court denied this request and only instructed the jury that the Government was not required to prove that membership was the sole or principal motive for committing the crime. On appeal the court found that the court's instruction tracked the statutory language and did not need to do more.

The risk is that any violent behavior by a member of such an enterprise can be said to be motivated, at least in part, by the desire to maintain status. This would transform the statute into a offense where membership plus proof of a criminal act is alone sufficient. That is more than Congress intended.

In this case, the indictment used as the predicate offense the Iowa crime of Attempt to Commit Murder. The facts of the case were that Mr. Patton was the passenger of a vehicle following an opposing gang member. That person stopped his car and the vehicle Mr. Patton was in continued driving past. An unknown person

started firing at the Mr. Patton and the others in his vehicle. A total of fourteen shell casings were found in the area where that person was standing. The rear of the vehicle with Mr. Patton was found to have bullet holes and another passenger was shot in the back of the head. Mr. Patton was seen leaning out of the window and firing back approximately one block past where the person was shooting at the vehicle. Eight shell casings were found that were fired from Mr. Patton's gun in that area.

Iowa does have a defense of justification. If raised, the prosecution must prove lack of justification beyond a reasonable doubt. The standard for submission is substantial evidence of self-defense from any source. At trial, the court made the legal determination that justification was not applicable to Mr. Patton as he was carrying a gun illegally. After trial it found that there was no evidence for submission. On appeal the court found that he had a duty to retreat, but returned fire before attempting to retreat, so the defense did not have to be considered by the jury. This is in spite of the fact that the shell casings from Mr. Patton's gun were found a block away from the person firing at him and all of the evidence was that the vehicle where he was a passenger continued driving away from the shooter.

There a number of important issues for the Court from this issue. First, the finding is in direct conflict with Iowa law. If state crimes are to be the basis for federal offenses, then following the law of the state is of paramount importance. Second, a basic part of any trial is that the jury must have the opportunity to consider the offered defense. Third, this type of defense turns into an element if

there is a basis for submission. Mr. Patton had the right to have the Government prove each element of the offense. That did not happen in this trial.

This Court should grant certiorari to resolve the circuit conflict on the first important issue and should grant certiorari to uphold the use of state law in federal prosecutions using an offense from that jurisdiction.

B. Facts. Mr. Patton was charged with Attempted Murder in Aid of Racketeering in violation of 18 U.S.C. § 1959(a)(5) and Use, Carry, and Discharge a Firearm During and in Relation to a Crime of Violence in violation of 18 U.S.C. § 924(c). The weapons count used as a predicate offense the attempted murder charge. The charge involved a local street gang known as "Only the Brothers" or "OTB." Indictment, *United States v. Patton*, No. 4:21-cr-00075, Doc. 2, pages 1-5 (S.D.IA.). He was also charged with Felon in Possession of a Firearm in violation of 18 U.S.C. 922(2)(1). *Id.*, Doc. 2, page 10. He plead guilty to that charge prior to trial. *Id.* Doc. 209.

The bulk of the Government's case in chief involved a series of shootings in the Des Moines area in 2020. One of these shootings occurred on May 10, 2020, starting at 30th and Clark Streets in Des Moines. *Id.*, Doc. 518, Trial Transcript, Vol. 3, pages 561-562. This incident was the basis for the charges contested at trial by Mr. Patton.

Allison (Doyle) Nelson was at Merle Hay Mall during the afternoon of May 10, 2020. *Id.*, Doc. 518, Trial Transcript Vol. 3, pages 712-713. She was there with

her then boyfriend, now husband, Raysean Nelson. *Id.*, page 713.

At the mall, she recognized Braden Shafer and Raekwon Patton. *Id.*, page 717. She knew Mr. Patton as his girlfriend used to watch her kids. *Id.* She was aware of Shafer as he would post vulgar messages on social media, including disrespectful messages about Nelson's deceased father. *Id.*, pages 717-718. This type of disrespect is a "gang thing." *Id.*, page 718-719.

Mr. Patton said, "Hi Allison" to her. No other words were exchanged. *Id.*, page 719. She told Nelson get in their car and drive off. *Id.*

Nelson drove towards the Drake area in Des Moines. *Id.*, page 721. The other vehicle, a white Trailblazer with Patton, Shafer and three others inside, followed them. *Id.*, pages 720-721. Nelson eventually stopped his car between 30th and 31st Streets on Clark Avenue in Des Moines. *Id.*, page 721.

Nelson exited his car. *Id.*, page 722. He ducked into some bushes. *Id.*, page 735. Ms. Nelson did not see him shoot at anyone. *Id.*, page 725. It was at this time that she heard shots and put her head down. *Id.* She knew that she and Nelson did not have a gun. *Id.*, pages 725, 729. She testified that during the trip from Merle Hay Mall to 31st and Clark neither she nor Nelson called anyone. *Id.*, page 728. Afterwards, Nelson returned and drove off before being questioned. They did not report the incident to the police. *Id.*

Tayronce Denton was in the car with Mr. Patton and the others when they went to Merle Hay Mall. *Id.*, pages 379, 544, 771-772. He knew that Shafer was

associated with the gang OTB. Mr. Patton and Rankin were members of another local gang called Heavy Hitters. *Id.*, page 773.

Denton testified that as they were leaving the mall, Allison got out of the car. They also saw Nelson get out of the car. *Id.*, page 774. Denton understood that Nelson was affiliated with the gang "C-Block," which was a rival to OTB and Heavy Hitters. *Id.*, page 775.

Denton and the others then got into the Trailblazer and followed the Nelson car. *Id.*, page 776. From Merle Hay Mall until the shooting a 31st and Clark Street, all they did was follow the car. *Id.*, page 788. After following the car, Denton described the scene as follows:

> A. After the windows went down, we got on the block. [Nelson] ran in front of the car. As soon as he got past the side view of the car, we started getting shot at, and I put my head down.
>
> Q. And when you put your head down, what happened?
>
> A. I felt movement at the side of me, but we was getting shot at, so...
>
> Q. And after you heard movement at the side of you – and you mean on either side of you? A. Yeah.
>
> Q. Did you hear shots?
>
> A. I heard shots when he first got past the car because we was getting shot at, shots coming from everywhere. So I'm not knowing if it's coming from inside or out – I know for sure it's coming from outside of the car because I put my head down then. Nobody had nothing out.
>
> Q. And you heard shots from everywhere, you said?
>
> A. Yeah.

Id., page 779.

Officer John Curtis was working patrol for the Des Moines Police Department on May 10, 2020. *Id.*, page 570. He saw a white Trailblazer eastbound crossing the intersection of 30th and Clark Streets with a black male shooting out of the rear passenger windows on the driver's side. *Id.*, pages 574, 593. His car camera captured the event. *Id.*, page 577.

As Officer Curtis followed the Trailblazer, he could see that the vehicle had been hit by gunshots. *Id.*, page 587. After the car was stopped, he found that one of the occupants, Braden Shafer, had been shot in the back of the head. *Id.*

Officers believed that a firearm had been thrown from the car while it was pursued by police cars. *Id.*, Doc. 521, Trial Transcript Vol. 6, page 1592. They traced the route of the Trailblazer and found a .40-caliber Smith & Wesson handgun the next morning. *Id.*, Doc. 519, Trial Transcript Vol. 4, page 850.

Officers at the scene of the shooting found two sets of spent bullet casings. *Id.*, Doc. 518, Trial Transcript Vol. 3, page 690. The first set was found on the north curb of Clark Street, by 31st Street, which would be the west end of the block. *Id.*, page 690-691, Government Exhibit 503. Twelve casings were initially found and two additional casings were later recovered in this area. *Id.*, page 691. All of the spent casings were .9-millimeter. *Id.*, page 692.

A series of .40-caliber shell casings were recovered in a line beginning roughly at the intersection of 30th and Clark and continuing east along Clark

Avenue in the 2900 block. *Id.*, Doc. 521, Trial Transcript Vol. 6, page 1604. This would be consistent with being fired out of a moving vehicle. *Id.* Seven casings were initially found with an eighth found the next day. *Id.*, Doc. 518, Trial Transcript Vol. 3, page 697. All of the spent casings were found to be fired by the .40 caliber Smith & Wesson handgun. *Id.*, Doc. 520, Trial Transcript Vol. 5, page 1424.

Spent bullet fragments were located in the middle of Clark Street, approximately a half block away from the .9-millimeter casings. *Id.* Doc. 518, Trial Transcript Vol. 3, pages 695-696, 708. The Trailblazer was found to have bullet holes to the rear windshield going into the vehicle and an impacts to the front driver's door just above the door handle. *Id.*, Doc. 521, Trial Transcript Vol. 6, pages 1590, 1616. There was also a bullet hole in the rear license plate. *Id.*, page 1591.

At trial both Mr. Patton and the Government requested instructions on justification as a defense. *Id.*, Doc. 249. Joint Proposed Final Jury Instructions, Numbers 19A, 19B, 20A, 20B 21A, pages 67-78. Mr. Patton also proposed an instruction on the purpose element of the Attempted Murder in Aid of Racketeering charge. *Id.*, Instruction Number 22B, page 81.

After deliberations, Mr. Patton was found guilty of both counts. *Id.*, Doc. 375, Verdict. The jury found that he had attempted to murder Mr. Nelson but acquitted him of attempting to murder Ms. Doyle Nelson. *Id.*

Mr. Patton was sentenced to 120 months each on the Attempted Murder in Aid of Racketeering and the Felon in Possession of a Firearm, with 60 months to

run concurrently and 60 months to run consecutively to each other; and 120 months on the § 924(c) count, to be served consecutively to all counts, for a total of 300 months. *Id.*, Doc. 480, Judgment.

On appeal the Eighth Circuit affirmed. Pet. App., page A-1.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS AS TO WHETHER THE PURPOSE ELEMENT OF THE VIOLENT CRIMES IN AID OF RACKETEERING STATUTE REQUIRES AT A MINIMUM THAT THE UNDERLYING CRIME BE COMMITTED AS A SUBSTANTIAL PURPOSE, OR DONE AS AN INTEGRAL ASPECT OF MEMBERSHIP IN THE ENTERPRISE.

Mr. Patton was charged with Attempted Murder in Aid of Racketeering, commonly know as the Violent Crimes in Aid of Racketeering statute ("VICAR"). That statute provides:

> "(a) Whoever, ... 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 ..."

18 U.S.C. § 1959(a). The underlying violent crime charged is a violation of the Iowa attempted murder statute. Iowa Code § 707.11(1).

At trial, he requested the Ninth Circuit pattern instruction on the purpose element of the offense. The requested instruction was as follows:

INSTRUCTION NO. 22B

DEFINITION OF ELEMENT FIVE: PURPOSE OF

MAINTAINING OR INCREASING POSITION IN ENTERPRISE

> Concerning element five, the government must prove beyond a reasonable doubt that the defendant's purpose was to gain entrance to, or to maintain, or to increase his position in the enterprise.
>
> *It is not necessary for the Government to prove that this motive was the sole purpose, or even the primary purpose of the defendant in committing the charged crime. You need only find that maintaining or enhancing his status in the "Only the Brothers" was a substantial purpose of the defendant or that he committed the charged crime as an integral aspect of membership in the "Only the Brothers."*
>
> In determining the defendant's purpose in committing the alleged crime, you must determine what he had in mind. Since you cannot look into a person's mind, you have to determine purpose by considering all the facts and circumstances before you.
>
> Commission of the crime while a member of the enterprise standing alone does not necessarily show that it is for the purpose of maintaining or increasing position in the organization, even if it would have the effect of maintaining or increasing position in the organization.

United States v. Patton, No. 4:21-cr-00075, Doc. 249, Joint Proposed Final Jury Instructions, Propose Instruction 22B, page 81. (emphasis added). The language is from the Ninth Circuit Court of Appeals. Ninth Circuit Pattern Jury Instruction, Criminal § 18.11.

The District Court denied the request to give the proposed instruction and instead instructed the jury as follows:

ATTEMPTED MURDER IN AID OF RACKETEERING
ELEMENT FIVE - PURPOSE TO MAINTAIN OR INCREASE
POSITION IN ENTERPRISE

> The fifth element that the Government must prove beyond a reasonable doubt as to Counts 1, 3, and 6 is that the defendant at issue's purpose in committing attempted murder in aid of racketeering,

> as alleged in those counts, was to maintain or increase position in the enterprise. *The Government is not required to prove that this was the sole or principal motive.*

Id., Doc. 372, Final Jury Instructions, page 32 (emphasis added).

On Appeal, the Circuit found that the jury instruction given was correct:

> The answer is no because the instruction 'fairly and adequately' told the jury what it needed to know. It closely tracked the statutory language, which does not specify how substantial the purpose must be.
>
> It also did not tempt the jury to focus just 'on [Patton's] status as a gang member.' In fact, the district court dispelled any possible confusion by giving specific examples of what would satisfy the legal standard: 'committ[ing] the crime because [the defendant] knew it was expected of him by reason of his membership' or 'thought it would enhance his position or prestige within the enterprise.' These examples focused the jury's attention where it belonged, which was on Patton's motivation for attempting the murder.

United States v. Mallory, 104 F.4th 15, 19 (8th Cir. 2024), Pet.App., page A-5.

The Ninth Circuit agreed with several sister circuits that the purpose element of the does not require that a defendant was "solely, exclusively, or even primarily motivated by a desire to gain entry into, or maintain or increase his status within, the criminal organization." *United States v. Banks*, 514 F.3d 959, 968 (9th Cir. 2008). But the Court also found that there is a limit to how incidental the motivation may be:

> We do not mean to say, however, that a defendant falls within the scope of VICAR if his desire to enhance or maintain his status in the organization had any role, no matter how incidental, in his decision to commit a violent act. To adopt such a broad interpretation would risk extending VICAR to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang; if the reach of this element were not cabined in some way, prosecutors might

> attempt to turn every spontaneous act or threat of violence by a gang member into a VICAR offense. The VICAR statute itself contains no indication that Congress intended it to make gang membership a status offense such that mere membership plus proof of a criminal act would be sufficient to prove a VICAR violation. Otherwise, every traffic altercation or act of domestic violence, when committed by a gang member, could be prosecuted under VICAR as well.

...

> We are persuaded that VICAR requires more than this. People often act with mixed motives, so the gang or racketeering enterprise purpose does not have to be the only purpose or the main purpose of the murder or assault. But it does have to be a substantial purpose. Murder while a gang member is not necessarily a murder for the purpose of maintaining or increasing position in a gang, even if it would have the effect of maintaining or increasing position in a gang. By limiting the statute's scope to those cases in which the jury finds that one of the defendant's general purposes or dominant purposes was to enhance his status or that the violent act was committed 'as an integral aspect' of gang membership, we ensure that the statute is given its full scope, without allowing it to be used to turn every criminal act by a gang member into a federal crime.

Id., 514 F.3d at 968-70.

Several circuits had indicated that there is such a limit, even if not explicitly. *United States v. Concepcion*, 983 F.2d 369, 381 (2nd Cir. 1993)(noting defendant's "general purpose" and that the violent act must be committed "as an integral aspect of membership."); *United States v. Smith*, 413 F.3d 1253, 1277 (10th Cir. 2005) (defendant's "general purpose"); *United States v. Tse*, 135 F.3d 200, 206 (1st Cir. 1998) (defendant's "general motive"); *United States v. Wilson*, 116 F.3d 1066, 1078 (5th Cir. 1997)(acts that are committed "as an integral aspect of membership"); *United States v. Fiel*, 35 F.3d 997,1003-04 (4th Cir. 1994)("violent crimes committed as an integral aspect of membership in [criminal] enterprises").

From these cases, the *Banks* court found, "[t]ogether, these cases suggest that, although the law does not require that the defendant's gang-related purpose be his primary or sole purpose, it does require that his purpose be more than merely incidental: It must be within his 'general' purpose, or, in the alternative, the violence committed must be in some way 'integral' to the defendant's membership in the gang." *Banks*, 514 F.3d at 969.

The Sixth Circuit has agreed with this analysis. It found:

> We agree with the Ninth Circuit that VICAR does not extend 'to any violent behavior by a gang member under the presumption that such individuals are always motivated, at least in part, by their desire to maintain their status within the gang[.]' *Banks*, 514 F.3d 959, 968 (9th Cir. 2008). Otherwise, in gang cases, the purpose element would be nearly a tautology. Nor is it enough if the defendant's gang-related purpose was 'merely incidental' to his action. *Id.* at 969. But neither is the government required to prove the defendant acted 'solely' or 'primarily' for a gang-related purpose. *See Id.* at 965-66 (collecting cases from five circuits). Instead, in this case, as in an analogous one, we conclude that VICAR's 'purpose' element is met if the jury could find that an 'animating purpose' of the defendant's action was to maintain or increase his position in the racketeering enterprise. *Cf. United States v. Faulkenberry*, 614 F.3d 573, 586 (6th Cir. 2010).

United States v. Hackett, 762 F.3d 493, 500 (6th Cir. 2014).

The Eighth Circuit has declined to require this minimum level for the purpose element of the offense. This is an expansion of federal criminal law to encompass state crimes without the requirement that it is limited in scope to crimes that are a substantial part of membership in the enterprise. This type of expansion means that any violent crime committed by a member of such a group, even if a domestic dispute or other crime which is the typical province of the state's criminal

justice system, can be a federal offense. That is not true in other parts of the country. It is an unwarranted expansion of Federal criminal law into traditional state offenses based only on the status of the person in certain groups.

The petition should be granted so that in all parts of the country, state crimes which are used for federal prosecution are required to show that the purpose was a substantial part in maintaining or increasing status in the enterprise or integral to such membership, not just that it was committed by a member of a certain group. It should be clear to the jury in every case that this type of offense is limited to those circumstances.

II. THE EIGHTH CIRCUIT HAS DECIDED INCORRECTLY THAT UNDER IOWA LAW THE DEFENSE OF JUSTIFICATION NEED NOT HAVE BEEN GIVEN TO THE JURY

Justification instructions were proposed by both the Government and the Defense. *United States v. Patton*, No. 4:21-cr-00075, Doc. 249, Joint Proposed Final Jury Instructions, Instruction, Numbers 19A, 19B, 20A, 20B, 21A. pages 70-78. The Circuit found that the justification defense did not have to be given, stating:

> Justification requires a bit more when the person claiming it was 'engaged in illegal activity.' Iowa Code § 704.1(3). Iowa allows most people facing injury or death to 'stand [their] ground.' *State v. Ellison*, 985 N.W.2d 473, 477–78 (Iowa 2023). But not Patton, who was 'engaged in [the] illegal activity' of possessing a firearm as a felon, which created a duty to retreat before he could use force himself. *Id.* (citation omitted); *State v. Baltazar*, 935 N.W.2d 862, 871 (Iowa 2019) (holding that a defendant who illegally brought a gun to a confrontation had a 'duty to retreat' before using it in self-defense).
>
> There was no evidence that he tried. It is true that the shell casings and bullet fragments discovered near the intersection and the bullet holes throughoutMallory's SUV are consistent with someone else

> shooting before Patton did, meaning that he might have had a 'reasonabl[e] belie[f] that [deadly] force [was] necessary.' Iowa Code § 704.3. But Patton, Mallory, and the others had a golden opportunity to escape, given that Nelson's car was already stopped. Yet, by having guns at the ready and rolling down the windows as they approached Nelson's parked car, the only reasonable inference was that they planned to fire regardless of what anyone else did. Cf. Iowa Code § 704.6(3) ('The defense of justification is not available to . . . [o]ne who initially provokes the use of force against oneself by one's unlawful acts . . . .'). It was, in other words, a preplanned drive-by shooting, not an act of justified self-defense. *See State v. Cruse*, 228 N.W.2d 28, 30 (Iowa 1975) (explaining that self-defense requires 'retreat[ing] as far as is reasonable and safe' (citation omitted)).
>
> No one doubts that, once the shooting started, Patton and the others faced grave danger. Look no further than the fact that a bullet struck another backseat passenger in the head. But we do not know when it happened—toward the beginning, middle, or end of the shootout—and an 'alternative course of action' may well have prevented it. *Baltazar*, 935 N.W.2d at 870. Unfortunately, Patton returned fire before anyone had a chance to try.

Mallory, 104 F.4th at 18 , Pet.App., pages A-3 - A-4.

The Court acknowledged that when the predicate crime comes from state law, then that state's law "defines its parameters, including potential defenses." *Id.*

In Iowa, the use of reasonable force can be used "when the person reasonably believes that such force is necessary to defend oneself or another from any actual or imminent use of unlawful force." Iowa Code § 704.3. the Iowa Code also provides, "[a] person who reasonably believes that a forcible felony is being or will imminently be perpetrated is justified in using reasonable force, including deadly force, against the perpetrator or perpetrators to prevent or terminate the perpetration of that felony." Iowa Code § 704.7. Attempted murder is a forcible felony in Iowa. *State v. Powers*, 278 N.W.2d 26, 28 (Iowa 1979). This is because the

crime necessarily includes a felonious assault. *Id.*

The standard for submission to the jury in Iowa is if there is "substantial evidence of self-defense from any source." *State v. Dunson*, 433 N.W.2d 676, 677 (Iowa 1988). "If substantial evidence exists, the district court has a duty to give the requested instruction." *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). After such evidence is provided, the question is for the jury. *State v. Fischer*, 245 Iowa 170, 173, 60 N.W.2d 105, 106 (1953). The burden shifts to the prosecution to disprove justification beyond a reasonable doubt. *State v. Lawler*, 571 N.W.2d 486, 489 (Iowa 1997).

Here, whatever the "only reasonable inference" that the appellate court believes, the jury could certainly find from the evidence that Patton only fired after being fired upon. An unknown person fired fourteen shots at the west end of the block. The vehicle with Mr. Patton was hit several times, including in the rear license plate and the rear window. Shafer, in the back seat, was struck in the back of the head. Patton did not fire until his vehicle had traveled a full block to the east of where the spent bullets of the assailant were found.

That is the undisputed basis for submission. That is the end point of the inquiry on submission. Even though Patton had a right to present a defense and have it considered, here it never was.

The panel opinion instead focused on the "duty" to retreat. That is incorrect for two reasons. First, the panel treats this as an absolute mandate. It is not. In Iowa it is a conditional depending on the circumstances. Force can be "used even if

an alternative course of action is available if the alternative entails a risk to life or safety, or the life or safety of a third party ..." Iowa Code § 704.1. That is why it has always been the case in Iowa that retreat is not required if it was not safe to do so. *State v. Shannon,* 214 Iowa 1093, 1100, 243 N.W. 507, 510 (1932). That would also be, of course, a jury question.

The panel opinion finds that there is "no evidence" that Patton tried to retreat. Slip Opinion at page 4. The first obvious question is what, exactly, was he individually supposed to do as the passenger in a moving car. But it also ignores the equally obvious fact that the vehicle was in fact moving away from the shooter for a block while being hit by bullets. There is no evidence that Patton's vehicle did anything but continue to drive past and away.

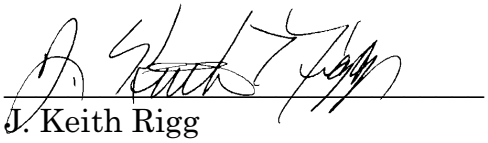
The panel stated, "[t]he only reasonable inference is that they planned to fire regardless of what anyone else did." Denton, the person seated next to Patton, testified for the Government. His testimony about the event is quoted above. He did not say anything like that. He never testified that there was any conversation about shooting and did not testify to seeing anything that conclusively led him to believe that a shooting was the only outcome.

If the federal government is going to use state offenses to prove federal crimes, it is also incumbent to have strict fidelity to state standards for submission of defenses. What should never happen is that a defense that would be given in the state attempted murder trial is not submitted to the jury in a federal VICAR trial. That is exactly what happened in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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