NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Kyle Dwayne Boleyn - 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

(1) Whether the determination of a "serious drug offense" under the Armed Career Criminal Act requires the same categorical approach used in the determination of a "violent felony" under the Act?

(2) Whether the Eighth Circuit properly considered the "lowest level of conduct" as required under this Court's precedent, and whether any uncertainty in state law should benefit the defendant, as the Fifth Circuit has held?

PARTIES TO THE PROCEEDINGS

The caption contains the names of all parties to the proceedings.

DIRECTLY RELATED PROCEEDINGS

United States v. Boleyn, 6:17-cr-02031 (N.D. Iowa) (criminal proceedings), judgment entered December 15, 2017.

United States v. Boleyn, 17-3817 (8th Cir.) (direct criminal appeal), judgment entered July 8, 2019.

United States v. Justin Vasey, 18-2248 (8th Cir.) (direct criminal appeal), judgment entered July 8, 2019, rehearing denied August 22, 2019.

United States v. Robert Fisher, 18-2562 (8th Cir.) (direct criminal appeal), judgment entered July 8, 2019, rehearing denied August 22, 2019.

United States v. Demetrius Green, 18-2286 (8th Cir.) (direct criminal appeal), judgment entered July 8, 2019, rehearing denied August 22, 2019.

United States v. Erwin Bell, 18-1021 (8th Cir.) (direct criminal appeal), judgment entered July 8, 2019, rehearing denied August 22, 2019.

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The petitioner, Kyle Boleyn, 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. 17-3817, entered July 8, 2019. Mr. Boleyn filed a petition for rehearing en banc and petition for rehearing by the panel. Mr. Boleyn's petition for rehearing en banc and petition for rehearing by the panel were denied on August 22, 2019.

OPINION BELOW

On July 8, 2019, a panel of the 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 929 F.3d 932.

JURISDICTION

The Court of Appeals entered its judgment on July 8, 2019, and denied Mr. Boleyn's petition for rehearing en banc and petition for rehearing by the panel on August 22, 2019. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) (2012):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(e)(2):

> As used in this subsection –
>
> (A) the term "serious drug offense" means--
>
> > (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
> > (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . . .

Iowa Code § 703.1

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

STATEMENT OF THE CASE

On June 16, 2016, Mr. Boleyn possessed a shotgun and ammunition. (DCD 14, p. 4).[1] Based upon this conduct, Mr. Boleyn was indicted in the Northern District of Iowa on one count of felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) & 924(e). (DCD 2). Pursuant to a plea agreement, Mr. Boleyn pleaded guilty to the sole count. (DCD 14). Under the terms of the plea agreement, the parties were free to litigate whether Mr. Boleyn was subject to the increased statutory penalties under the Armed Career Criminal Act ("ACCA"). (DCD 14).

A presentence investigation report (PSR) was prepared. The PSR asserted that Mr. Boleyn was an Armed Career Criminal, increasing his statutory range from zero to ten years of imprisonment to fifteen years to life imprisonment. The PSR identified seven convictions under Iowa's controlled substance statute, Iowa Code § 124.401(1)(c)(6) & (7), as ACCA predicate offenses. (PSR ¶¶ 23, 25, 26, 32).

[1] In this brief, "DCD" refers to the criminal docket in Northern District of Iowa Case No. 6:17-cr-02031, and is followed by the docket entry number. "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "Sent. Tr." refers to the sentencing transcript in Northern District of Iowa Case No. 6:17-cr-02031.

The convictions were for manufacture or delivery of methamphetamine. (PSR ¶¶ 23, 25, 26, 32). The PSR stated these were "serious drug offenses." (PSR ¶¶ 23, 25, 26, 32).

Mr. Boleyn argued that under the reasoning of *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), none of his convictions were ACCA predicates because aiding and abetting was always part of the definition of the "generic offense," and Iowa aiding and abetting was broader than the generic definition of aiding and abetting. (DCD 30). Specifically, he asserted generic aiding and abetting required the intent to promote or facilitate the underlying offense, while Iowa aiding and abetting only required "knowing participation." (DCD 30).

In *Valdivia-Flores*, the Ninth Circuit analyzed whether a Washington conviction was an aggravated felony. (DCD 30). The Ninth Circuit found that because Washington's aiding and abetting statute was broader than the generic definition of aiding and abetting, the offense was overbroad and did not qualify as an aggravated felony. (DCD 30). Mr. Boleyn argued that Washington's aiding and abetting statute is virtually identical to Iowa's aiding and abetting statute, and therefore based on the reasoning in *Valdivia-Flores* Mr. Boleyn's Iowa convictions were not ACCA predicates. (DCD 30).

The government resisted, first stating that *Valdivia-Flores* was wrongly decided and the court should decline to follow it. (DCD 33). Alternatively, the

government argued that Iowa's aiding and abetting statute was broader than the generic definition of aiding and abetting. (DCD 33).

At sentencing, the district court overruled the objection and found that Mr. Boleyn was an Armed Career Criminal. (Sent. Tr. pp. 19-20). First, the court declined to follow the analysis of the majority in *Valdivia-Flores*. (Sent. Tr. p. 19). Further, the court found that Iowa's aiding and abetting statute was not broader than the generic definition of aiding and abetting. (Sent. Tr. p. 19). The court calculated Mr. Boleyn's guideline range as 188 to 235 months of imprisonment, based on a total offense level of 31 and criminal history category VI. (Sent. Tr. p. 20). The district court sentenced Mr. Boleyn to 188 months of imprisonment. (Sent. Tr. p. 33). At the conclusion of sentencing, the district court urged Mr. Boleyn to appeal, noting that he had raised a "substantial" and "important" legal issue. (Sent. Tr. p. 36).

Mr. Boleyn appealed to the Eighth Circuit, maintaining his argument that his Iowa convictions were not "serious drug offenses." The Eighth Circuit heard oral argument on five cases[2] raising this argument or substantially similar

[2] *United States v. Boleyn*, No. 17-3817; *United States v. Bell*, No. 18-1021; *United States v. Vasey*, No. 18-2248; *United States v. Green*, No. 18-2286; and *United States v. Fisher*, No. 18-2562. The Eighth Circuit combined the defendants' cases for purposes of the opinion, but it does not appear that the cases were officially consolidated. Petitions for writ of certiorari were filed on these cases on this same date.

arguments. In a joint opinion, the Eighth Circuit rejected Mr. Boleyn's argument. *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019).

First, the Eighth Circuit determined that the categorical approach, as it was laid out in *Taylor v. United States*, 495 U.S. 575 (1990), was unnecessary to determine if the Iowa convictions were serious drug offenses under the ACCA. *Id.* at 936-37. The court found that the use of the word "involving" in the ACCA definition meant that no specific *mens rea* was required. *Id.* While making reference to a "categorical approach," the court did not require a generic definition but determined that a prior state conviction qualifies if it involves or relates to drug manufacture, distribution, or possession. *Id.* The court did not elaborate on how to determine whether a state conviction meets this standard. *Id.*

Later in the opinion, the Eighth Circuit determined that Iowa aiding and abetting was not broader than generic aiding and abetting.[3] *Id.* at 938-40. The court assumed without deciding that generic aiding and abetting requires an intent to promote or facilitate the underlying offense. *Id.*[4] The court also agreed that it was necessary to compare Iowa aiding and abetting with generic aiding and

[3] While the Eighth Circuit determined the categorical approach was unnecessary, the court did engage in the categorical approach to address separate defendants' Guidelines' challenges.

[4] The Ninth Circuit Court of Appeals has held that generic aiding and abetting requires the intent to promote or facilitate the underlying offense, and that knowledge is insufficient. *United States v. Franklin*, 904 F.3d 793, 798-99 (9th Cir. 2018).

abetting. *Id*. The court ultimately found that Iowa's aiding and abetting liability was "substantially equivalent to" the generic definition of aiding and abetting, and therefore the defendants failed to show a "realistic probability" that Iowa aiding and abetting would be applied in an overbroad manner. *Id*. at 940. The court reasoned that because Iowa courts, at times, would discuss the intent to promote or facilitate the underlying offense, overbreadth issues were not present. *Id*.

Mr. Boleyn filed a petition for rehearing en banc and rehearing by the panel. The petitions were denied on August 22, 2019.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's decision upends *Taylor v. United States*, 495 U.S. 575, 600 (1990), and conflicts with decisions of this Court and other circuits. A key principle of *Taylor* was to require courts to rely on uniform definitions when analyzing how State convictions impact federal sentencing under the categorical approach. 495 U.S. at 600. The Eighth Circuit rejected that principle, and declined to adopt a generic definition for "serious drug offense." Instead, the court set a vague standard for determining whether an offense is an ACCA predicate that will prove difficult for judges and practitioners to apply uniformly moving forward.

In so ruling, this court entered a circuit split. A circuit split exists on whether the *Taylor* categorical approach applies to the determination of serious drug offenses under the ACCA. This Court recently granted cert to decide this issue in *Shular v. United States*, No. 18-6662 (U.S. Jun 28, 2019).

Turning to the second half of the decision, the Eighth Circuit's holding that Iowa aiding and abetting is not broader than generic aiding and abetting is an erroneous application of this Court's precedent. Instead of looking to the lowest level of conduct, as required by *Moncrieffe v. Holder*, 569 U.S. 184 (2013), the court found select cases that applied Iowa aiding and abetting in the generic manner and determined the convictions qualified. This also conflicts with how other circuits handle the interpretation of state law when state law is unclear.

I. THE CATEGORICAL APPROACH IS REQUIRED TO DETERMINE WHETHER A STATE CONVICTION QUALIFIES AS A SERIOUS DRUG OFFENSE UNDER THE ARMED CAREER CRIMINAL ACT.

First, the Eighth Circuit erred in finding it unnecessary to compare generic aiding and abetting with Iowa aiding and abetting to see if the Mr. Boleyn's prior convictions were serious drug offenses. The court determined that any *mens rea* aiding and abetting concerns were irrelevant because "involving" is an "expansive term that requires only that the convicted be related to or connected with drug manufacture, distribution, or possession, as to opposed to including those acts as an element of the offense." *Boleyn*, 929 F.3d at 938.

This rationale cannot stand because it conflicts with this Court's precedent. In *Kawashima v. Holder*, 565 U.S. 478 (2012), the Court considered whether the offense of willfully making and subscribing a false tax return, in violation of 26 U.S.C. § 7206(1), constituted a crime "involving fraud or deceit," and therefore an aggravated felony under the Immigration and Nationality Act. The Court employed

a categorical approach. *Id*. at 483. Specifically, the Court determined the generic definition of "involves fraud or deceit," and found that the phrase was intended to encompass offenses "with elements that necessarily entail fraudulent or deceitful conduct." *Id*. at 484. After determining the generic definition under the INA, the Court found that § 7206 qualified as an offense that "involve[d] fraud or deceit" using the categorical approach. *Id*.; *see also Nijhawan v. Holder*, 557 U.S. 29, 36 (2009) (holding that the determination of "aggravated felony," defined as "an offense that . . . involves fraud or deceit" refers to crimes generically defined).

The qualifying "serious drug offenses" under ACCA present a similar construct, *i.e.*, offenses under state law "involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . ." 18 U.S.C. § 924(e)(2)(A)(ii). Like the term "violent felony" construed in *Taylor*, "serious drug offense" is defined in terms of an enumerated list of generic crimes. Therefore, this Court should find the categorical approach is required when analyzing whether an offense is a serious drug offense.

The Ninth, Sixth, and Third Circuits have held that the categorical approach applies. *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018); *United States v. Goldston*, 906 F.3d 390 (6th Cir. 2018); *United States v. Henderson*, 841 F.3d 623 (3d Cir. 2016). In *Franklin*, the Ninth Circuit found that because Washington aiding and abetting (which only requires a knowing *mens rea*) was broader than

generic aiding and abetting, the defendant's Washington drug offense was not a serious drug offense.

Here, to find that *mens rea* was irrelevant, the Eighth Circuit relied upon *United States v. Smith*, 775 F.3d 1262 (11th Cir. 2014), and *United States v. Curry*, 404 F.3d 316 (5th Cir. 2005). Notably, *Curry* predates *Kawashima*. *Smith* does not even discuss *Kawashima*. Therefore, these opinions are unpersuasive.

This Court should grant cert to reverse the Eighth Circuit's refusal to apply the categorical approach when determining whether a State offense is a serious drug offense.

II. UNDER THE CATEGORICAL APPROACH, IOWA AIDING AND ABETTING IS BROADER THAN GENERIC AIDING AND ABETTING. THE EIGHTH CIRCUIT FAILED TO CONSIDER THE LOWEST LEVEL OF CONDUCT THAT COULD SUPPORT AN AIDING AND ABETTING CONVICTION.

In the second part of the opinion, the Eighth Circuit did compare generic aiding and abetting with Iowa aiding and abetting.[5] The court found that because the Iowa appellate courts, at times, would require aiders and abettors to have the intent to promote or facilitate the underlying offense—often called the *Peoni* standard—that Iowa aiding and abetting is not overbroad. However, the court ignored Iowa case law that only requires aiders and abettors to knowingly

[5] The court engaged in this analysis to address a separate defendant's Guideline challenge. However, the analysis would still be relevant to Mr. Boleyn's case, if this Court determines the categorical approach applies.

participate. Therefore, under *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013), this was error.

As stated in *Moncrieffe*, a court must consider the lowest level of conduct that could establish a conviction to determine if a prior conviction is overbroad. 569 U.S. at 190; *see also United States v. Nicholas*, 686 Fed. App'x 570, 575 (10th Cir. 2017) ("[O]ur analysis must focus on the lowest level of conduct that can support a conviction under the statute."). Iowa law establishes that courts routinely only require a knowing *mens rea* for aiding and abetting convictions, including as recently as this year.

The starting point for this analysis is Iowa's model jury instruction on aiding and abetting. Iowa's model jury instructions are clear that Iowa aiding and abetting only requires knowledge, not purposeful motive:

> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting". Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting".
>
> If you find the State has proved the defendant directly committed the crime, or knowingly "aided and abetted" [another] person in the commission of the crime, then the defendant is guilty of the crime charged.

Iowa Criminal Jury Instructions 200.8 (emphasis added) Several Iowa courts of appeals have cited and used this pattern instruction for aiding and abetting. *See*

State v. Robinson, 2019 WL 319839, at *3 (Iowa Ct. App. 2019) (stating that the mens rea for aiding and abetting is knowledge).

Iowa courts have upheld convictions under the theory of aiding and abetting when the defendant only had "knowledge." In *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006), the Iowa Supreme Court upheld a conviction for aiding and abetting the manufacture of a controlled substance (under Iowa Code § 124.401) for a knowing *mens rea*. The defendant had at minimum allowed drug manufacturing to occur at his residence. *Id*. The Iowa Supreme Court found this was sufficient because it established the defendant "knowingly participated" in the offense. *Id*. Overall, when the model jury instruction, which is relied upon to this day, allows for a conviction for non-generic aiding and abetting, there is no "stretch of legal imagination," but instead a "realistic probability" that Iowa aiding and abetting is overbroad.

It is true that the Iowa appellate courts have, at times, cited the *Peoni* standard. To be blunt, Iowa case law on the *mens rea* for aiding and abetting is a bit all over the place. But this uncertainty and inconsistency does not benefit the government. Other circuits have found that when faced with uncertainty of state law, the uncertainty benefits the defendant. *United States v. Herrold*, 883 F.3d 517, 522 (5th Cir. 2018) (en banc). Regardless, the question is the lowest level of conduct, and, as established above, the lowest level of conduct for Iowa aiding and abetting is "knowing participation."

CONCLUSION

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

RESPECTFULLY SUBMITTED,

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