NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Justin Scott Vasey - 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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QUESTION PRESENTED

(1) Whether the Eighth Circuit properly considered the "lowest level of conduct" as required under this Court's precedent for the categorical approach, 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. Vasey, 4:17-cr-00082 (S.D. Iowa) (criminal proceedings), judgment entered May 24, 2018.

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

United States v. Kyle Boleyn, 17-3817 (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. Robert Fisher, 18-2562 (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.

TABLE OF CONTENTS

INDEX TO APPENDICES

Table of Authorities

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The petitioner, Justin Vasey, 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. 18-2248, entered on July 8, 2019. Mr. Vasey filed a petition for rehearing en banc and petition for rehearing by the panel. Mr. Vasey'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 Southern 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. Vasey'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

USSG § 4B1.2(b):

> The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2 cmt. 1

> "Crime of violence" and "controlled substance offense" include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

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

In January 2017, United States Postal Inspectors intercepted a package containing methamphetamine that was addressed to Mr. Vasey. (PSR ¶ 7).[1] Law enforcement conducted a controlled delivery of the package to Mr. Vasey's residence. (PSR ¶ 8). In a later interview, Mr. Vasey admitted he had agreed to receive the methamphetamine. (PSR ¶ 9).

Based on this conduct, Mr. Vasey was indicted in the Southern District of Iowa on one count of possession with intent to distribute 50 grams or more of a mixture and substance containing methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). (DCD 2). Mr. Vasey pleaded guilty to the sole count, without a plea agreement. (DCD 43).

A presentence investigation report (PSR) was prepared. The PSR asserted that Mr. Vasey was a career offender, increasing his offense level by 10 levels and also increasing his criminal history category. (PSR ¶ 23). The PSR identified two convictions under Iowa's controlled substance statute, Iowa Code § 124.401(4)—for possession of ephedrine or pseudoephedrine with the intent to use to manufacture a

[1] In this brief, "PSR" refers to the presentence report, followed by the relevant paragraph number in the report. "DCD" refers to the criminal docket in Southern District of Iowa Case No. 4:17-cr-00082, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 4:17-cr-00082.

controlled substance—as controlled substance offenses under the guidelines. (PSR ¶ 30, 32).

Mr. Vasey objected to the finding that he was career offender. (DCD 45). He argued that his convictions did not qualify as controlled substance offenses based on *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). (DCD 45). He argued that under the reasoning of *Valdivia-Flores*, none of his convictions were controlled substance offenses 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. 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."

In *Valdivia-Flores*, the Ninth Circuit analyzed whether a Washington conviction was an aggravated felony. 876 F.3d 1201. 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. *Id.* Mr. Vasey 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. Vasey's Iowa convictions were not controlled substance offenses.

The government resisted, first stating that *Valdivia-Flores* was wrongly decided and the court should decline to follow it. (DCD 48). Alternatively, the

government argued that Iowa's aiding and abetting statute was not broader than the generic definition of aiding and abetting. (DCD 48).

At sentencing, the district court overruled the objection and found that Mr. Vasey was a career offender. (Sent. Tr. p. 11). The court calculated Mr. Vasey'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. 9). The district court sentenced Mr. Vasey to 130 months of imprisonment. (Sent. Tr. p. 32).

Mr. Vasey appealed to the Eighth Circuit, maintaining his argument that his Iowa convictions were not controlled substance offenses and he was not a career offender. The Eighth Circuit heard oral argument on five cases[2] raising this argument or similar arguments. In a joint opinion, the Eighth Circuit rejected Mr. Vasey's argument. *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019).

As relevant to Mr. Vasey's case, the Eighth Circuit determined that Iowa aiding and abetting was not broader than generic aiding and abetting. *Id.* at 938-40. The Circuit assumed without deciding that generic aiding and abetting requires

[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.

an intent to promote or facilitate the underlying offense.[3] *Id*. The court also agreed that it was necessary to compare Iowa aiding and abetting with generic aiding and abetting to determine if Mr. Vasey's state convictions were controlled substance offenses. *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. Vasey 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 holding that Iowa aiding and abetting is not broader than generic aiding and abetting is an erroneous application of Supreme Court 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

[3] 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).

qualified. The court's approach also conflicts with how other circuits handle the interpretation of state law when state law is unclear.

I. 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.

As stated in *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013), courts must consider the lowest level of conduct that could establish a conviction to determine if a prior conviction is overbroad. *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."). Below, the Eighth Circuit failed to follow this procedure. Instead, 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 offense—often called the *Peoni* standard— Iowa aiding and abetting is not overbroad. This was error. 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. Vasey respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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