APPENDIX

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
v.
Justin Scott Vasey

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:17-cr-00082-001

USM Number: 18208-030

Timothy S. Ross-Boon
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One of the Indictment filed on April 26, 2017.

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. § 841(a)(1), 841(b)(1)(B)	Possession with Intent to Distribute 50 Grams or More of a Mixture and Substance Containing Methamphetamine	01/12/2017	One

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 24, 2018
Date of Imposition of Judgment

Signature of Judge

Rebecca Goodgame Ebinger, U.S. District Judge
Name of Judge Title of Judge

Date

DEFENDANT: Justin Scott Vasey
CASE NUMBER: 4:17-cr-00082-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

130 months as to Count One of the Indictment filed on April 26, 2017.

☑ The court makes the following recommendations to the Bureau of Prisons:

The defendant be placed at the Oxford Federal Correctional Institution, if commensurate with his security and classification needs, and that he be made eligible for the 500-hour residential drug abuse program (RDAP).

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Justin Scott Vasey
CASE NUMBER: 4:17-cr-00082-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :
Six years as to Count One of the Indictment filed on April 26, 2017.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Justin Scott Vasey
CASE NUMBER: 4:17-cr-00082-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Justin Scott Vasey
CASE NUMBER: 4:17-cr-00082-001

SPECIAL CONDITIONS OF SUPERVISION

You must participate in a program of testing and/or treatment for substance abuse, as directed by the Probation Officer, until such time as the defendant is released from the program by the Probation Office. At the direction of the probation office, you must receive a substance abuse evaluation and participate in inpatient and/or outpatient treatment, as recommended. Participation may also include compliance with a medication regimen. You will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. You must not use alcohol and/or other intoxicants during the course of supervision.

You will submit to a search of your person, property, residence, adjacent structures, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), and other electronic communications or data storage devices or media, conducted by a U.S. Probation Officer. Failure to submit to a search may be grounds for revocation. You must warn any other residents or occupants that the premises and/or vehicle may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of your release and/or that the area(s) or item(s) to be searched contain evidence of this violation or contain contraband. Any search must be conducted at a reasonable time and in a reasonable manner. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Justin Scott Vasey
CASE NUMBER: 4:17-cr-00082-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

☐ Pursuant to 18 U.S.C. § 3573, upon the motion of the government, the Court hereby remits the defendant's Special Penalty Assessment; the fee is waived and no payment is required.

	Assessment	JVTA Assessment *	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Justin Scott Vasey
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All crimnal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,(5) fine interest, (6) community restitution, (7) JVTA assessment, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals
For the Eighth Circuit

No. 17-3817

United States of America

Plaintiff - Appellee

v.

Kyle Dwayne Boleyn

Defendant - Appellant

No. 18-1021

United States of America

Plaintiff - Appellee

v.

Erwin Keith Bell

Defendant - Appellant

No. 18-2248

United States of America

Plaintiff - Appellee

v.

Justin Scott Vasey

Defendant - Appellant

No. 18-2286

United States of America

Plaintiff - Appellee

v.

Demetrius Marcellus Green

Defendant - Appellant

No. 18-2562

United States of America

Plaintiff - Appellee

v.

Robert Joseph Fisher

Defendant - Appellant

Appeals from United States District Courts
for the Northern and Southern Districts of Iowa

Submitted: January 17, 2019
Filed: July 8, 2019

Before LOKEN, GRASZ, and STRAS, Circuit Judges.

LOKEN, Circuit Judge.

We consolidated these five sentencing appeals because they present a common issue: whether a prior conviction under Iowa Code § 124.401 qualifies as a predicate offense warranting sentence enhancements under the Armed Career Criminal Act ("ACCA"), the Controlled Substances Act ("CSA"), and the career offender provisions of the Sentencing Guidelines if the Iowa law of aiding and abetting liability is "overly broad." Five judges of the United States District Courts for the Northern and Southern Districts of Iowa concluded that a conviction under § 124.401 is a

"serious drug offense" under the ACCA, 18 U.S.C. § 924(e)(2)(A)(ii); a "felony drug offense" under the CSA, 21 U.S.C. § 841(b)(1)(D); or a "controlled substance offense" under § 4B1.2(b) of the Guidelines.[1] Separately considering the three enhancement provisions, we agree with the district courts' conclusions and therefore affirm each of the five sentences.[2]

I. The Common Issue.

Kyle Dwayne Boleyn and Erwin Keith Bell each pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). The district courts concluded that their multiple prior convictions under Iowa Code § 124.401 were "serious drug offenses" under the ACCA. This determination increased their advisory guidelines ranges and subjected them to the ACCA's mandatory minimum fifteen-year sentence, rather than the maximum ten-year sentence under § 922(g). See 18 U.S.C. § 924(a)(2).

Justin Vasey, Robert Fisher, and Demetrius Green each pleaded guilty to possession with intent to distribute controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) or (D). The district courts determined they were subject to the career offender enhancement under § 4B1.1 of the Guidelines because their

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[1]The Honorable Mark W. Bennett, Linda R. Reade, and Leonard T. Strand, United States District Judges for the Northern District of Iowa, and the Honorable John A. Jarvey and Rebecca Goodgame Ebinger, United States District Judges for the Southern District of Iowa.

[2]Appellant Robert Fisher also argues that one Iowa drug conviction does not qualify as a career offender predicate because the government failed to prove he was incarcerated during the fifteen years prior to the instant offense. See USSG § 4A1.2(e)(1). After careful review of the sentencing record as a whole, we conclude the district court's finding on this issue was not clearly erroneous. See United States v. Simms, 695 F.3d 863, 864-65 (8th Cir. 2012) (standard of review).

prior convictions under § 124.401 were "controlled substance offenses." This significantly increased their advisory guidelines ranges. The district court also determined that one of Green's two convictions under § 124.401 qualified as a prior "felony drug offense" under the CSA, 21 U.S.C. § 802(44). This increased the statutory maximum sentence for his marijuana offense of conviction from five to ten years under § 841(b)(1)(D).

On appeal, each defendant argues that the district court erred in determining that his prior convictions under § 124.401 warrant a drug offense enhancement under the ACCA, the career offender guidelines provisions, or the CSA. The Iowa statute at issue provides:

> it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.

Iowa Code § 124.401(1). Raising an issue of first impression in this circuit, defendants argue that *no* conviction under this statute can be a predicate prior conviction under the ACCA, the CSA, or the career offender guidelines because aiding and abetting liability is inherent in the definition of all drug offenses, and Iowa's doctrine of aiding and abetting is broader than "the generic definition of aiding and abetting." More specifically, defendants argue that a "vast majority of relevant authorities -- the federal courts, 45 state jurisdictions, and the Model Penal Code -- [hold] that a defendant cannot be convicted on an aiding and abetting theory on only a 'knowledge' *mens rea*." By contrast, Iowa is one of the few States that "only requires mere knowledge that one's actions will facilitate a crime." Because "knowledge" is a lesser *mens rea* than "intent," defendants posit, "it follows, with

respect to aiding and abetting liability, that Iowa § 124.401 is broader than" drug offenses as defined in the ACCA, the CSA, or the career offender guidelines.

We review *de novo* the determination that a prior conviction qualifies as a sentence enhancing predicate. See United States v. Jones, 574 F.3d 546, 549 (8th Cir. 2009) (ACCA); United States v. Sturdivant, 513 F.3d 795, 803 (8th Cir. 2008) (CSA); United States v. Eason, 643 F.3d 622, 623 (8th Cir. 2011) (USSG). Though creative, we conclude defendants' contention is unsound.

II. The Analytical Framework.

In determining whether a prior § 124.401 conviction qualifies as a predicate offense for purposes of these federal sentencing enhancements, we apply a categorical approach that looks to the statutory definition of the prior offense, not to the facts underlying a defendant's prior convictions. Taylor v. United States, 495 U.S. 575, 600-02 (1990). In Taylor, the Court considered whether a burglary conviction fell within the ACCA provision defining violent felony to include certain enumerated offenses. See 18 U.S.C. § 924(e)(2)(B)(ii) ("is burglary"). If the state statute "sweeps more broadly" than the generic crime enumerated, a conviction "cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." Descamps v. United States, 133 S. Ct. 2276, 2283 (2013).

By contrast, when a federal enhancement provision incorporates state offenses by language other than a reference to generic crimes, the categorical approach still applies, but the inquiry is focused on applying the ordinary meaning of the words used in the federal law to the statutory definition of the prior state offense. See United States v. Sonnenberg, 556 F.3d 667, 671 (8th Cir. 2009) ("aggravated sexual abuse, sexual abuse, or abusive sexual conduct with a minor or ward," 18 U.S.C. § 2252); cf. Nijhawan v. Holder, 557 U.S. 29, 36-38 (2009) ("aggravated felony" in the Immigration and Nationality Act). In United States v. Maldonado, 864 F.3d 893, 897-

901 (8th Cir. 2017), we applied the categorical approach in rejecting the argument that Iowa Code § 124.401 is not a "controlled substance offense" under the career offender guidelines because it could be construed to apply to offers to sell.

This case presents a different issue, whether Iowa's doctrine of aiding and abetting liability renders every § 124.401 conviction overly broad under each of the three federal enhancement provisions at issue. The argument was "teed up," in defendants' view, by the Supreme Court's decision in Gonzales v. Duenas-Alvarez that "every jurisdiction -- all States and the Federal Government -- has expressly abrogated the distinction among principals and aiders and abettors." 549 U.S. 183, 189 (2007) (quotation omitted). This is certainly true in Iowa, where a separate statute provides that aiders and abettors are to be "charged, tried and punished as principals." Iowa Code § 703.1. Thus, § 124.401, the statute at issue, defines the criminal offense but contains no reference to aiding and abetting liability. Iowa law does not require that an individual be charged as an aider and abettor for the theory to apply, see State v. Satern, 516 N.W.2d 839, 842-45 (Iowa 1994), nor does it require a unanimous verdict that defendant acted as a principal as opposed to an aider and abettor, see White v. State, 380 N.W.2d 1, 4 (Iowa App. 1985).

III. The ACCA and CSA Enhancements.

Defendants Bell and Boleyn were sentenced under the ACCA's sentencing enhancement because they violated 18 U.S.C. § 922(g) and have three prior convictions for a "serious drug offense." See 18 U.S.C. §§ 924(a)(2) and (e)(1). The ACCA defines "serious drug offense" as (i) an offense under enumerated federal controlled substances statutes or "(ii) an offense under State law, *involving* manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" as defined by federal law. 18 U.S.C. § 924(e)(2)(A)(ii) (emphasis added).

Defendant Green's sentence was enhanced under the CSA to a maximum of ten rather than five years in prison because he violated 21 U.S.C. § 841(a)(1) after a prior conviction for a "felony drug offense." "Felony drug offense," as used in § 841 is defined as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct *relating to* narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (emphasis added). "Section 802(44) defines the precise phrase used in § 841(b)(1)(A) -- 'felony drug offense.'" Burgess v. United States, 553 U.S. 124, 129 (2008).

Iowa Code § 124.401 provides that "it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance." Defendants argue that their convictions under § 124.401 cannot be ACCA and CSA drug offense predicates because the required *mens rea* under Iowa's doctrine of aiding and abetting is mere knowledge, which is broader than "generic" aiding and abetting.[3] This issue turns on the definitions of predicate state offenses in the ACCA and the CSA: we must determine whether a conviction under Iowa Code § 124.401, which may have been based on aiding and abetting liability, is categorically a conviction for an offense that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance," 18 U.S.C. § 924(e)(2)(A)(ii), or for an offense that "prohibits or restricts conduct relating to

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[3]We reject the government's contention that the categorical approach permits us to look only to § 124.401, the statute of conviction. The Supreme Court explained in Duenas-Alvarez that, in determining whether a prior state conviction was a "theft offense" listed in the Immigration and Nationality Act, "one who aids or abets a theft falls, like a principal, within the scope of [the theft offense's] generic definition." 549 U.S. at 189. As aiding and abetting liability is inherent in every conviction under Iowa Code § 124.401, it is consistent with the categorical approach to look to Iowa's aiding and abetting statute in determining whether the prior offense of conviction is overbroad. See Taylor, 495 U.S. at 600-02.

narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances," 21 U.S.C. § 802(44).

In United States v. Bynum, we concluded that a conviction for knowingly offering to sell an illegal drug was sufficiently related to drug distribution to qualify as a "serious drug offense" predicate under the ACCA. We explained that the ACCA "uses the term 'involving,' an expansive term that requires only that the conviction be related to or connected with drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense." 669 F.3d 880, 886 (8th Cir. 2012) (quotation omitted). Likewise, this expansive language includes all conduct encompassed by aider and abettor liability under § 124.401. Whether Bell, Boleyn, and Green were convicted of knowingly aiding and abetting the delivery of a controlled substance, as opposed to intentionally aiding and abetting delivery, makes no difference. They were convicted of conduct that "involved" and "related to" drug distribution. We note that, in other contexts, other circuits have ruled that "[n]o element of *mens rea* with respect to the illicit nature of the controlled substance is expressed or implied by" these ACCA and CSA definitions. United States v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014); see United States v. Curry, 404 F.3d 316, 319 & n.6 (5th Cir. 2005). We disagree with the Ninth Circuit's contrary ACCA analysis in United States v. Franklin, 904 F.3d 793, 800-802 (9th Cir. 2018).[4]

Looking only to the fact of a prior conviction and the statutory definition of a drug offense under Iowa Code § 124.401, including the Iowa law of aiding and abetting liability, as the categorical approach requires, we conclude that convictions under this state statute categorically "involve" and "relate to" the offenses described in 18 U.S.C. § 924(e)(2)(A)(ii) and 21 U.S.C. § 802(44). Accordingly, the district

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[4]The Supreme Court recently granted a petition for a writ of certiorari to resolve a conflict in the circuits regarding this issue. Schular v. United States, No. 18-6662 (U.S. Jun. 28, 2019).

courts properly imposed the ACCA and CSA statutory enhancements based on prior convictions of Bell, Boleyn, and Green under Iowa Code § 124.401.

IV. The Career Offender Enhancement.

Defendants Vasey, Green, and Fisher were sentenced as career offenders under the Guidelines because they have at least two prior felony convictions of a "controlled substance offense." USSG § 4B1.1(a)(3). The Guidelines define "controlled substance offense" as "an offense under federal or state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." § 4B1.2(b). This definition expressly includes "the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." § 4B1.2, comment. (n.1). Again, we apply a categorical approach to determine whether Iowa Code § 124.401 "criminalize[s] more than the guidelines definition of 'controlled substance offense.'" United States v. Thomas, 886 F.3d 1274, 1276 (8th Cir. 2018).

Defendants argue that § 124.401 is broader than the guidelines definition of controlled substance offense because Iowa law imposes aiding and abetting liability more broadly than the "generic" definition of aiding and abetting.[5] Application note 1 to § 4B1.2 includes "the offenses of aiding and abetting" but does not define that term. In general, "[c]onsiderable confusion exists as to what the accomplice's mental state must be in order to hold him accountable" as an aider or abettor. 2 Wayne R. LaFave et al., Substantive Criminal Law § 13.2(b) (3d ed. 2018). As the Seventh Circuit succinctly explained some years ago:

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[5]Defendants do not contend that the substantive provisions of § 124.401 include conduct not encompassed by the definition of controlled substance offense in § 4B1.2(b), the issue in Maldonado, 864 F.3d at 899. Only the extent of aiding and abetting liability is at issue on these appeals.

> Under the older cases . . . it was enough that the aider and abettor knew the principal's purpose. Although this is still the test in some states . . . after the Supreme Court in *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949), adopted Judge Learned Hand's test -- that the aider and abettor "in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed," *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938) -- it came to be generally accepted that the aider and abettor must share the principal's purpose in order to be guilty of violating 18 U.S.C. § 2, the federal aider and abettor statute. . . . But . . . there is support for relaxing this requirement when the crime is particularly grave.

United States v. Fountain, 768 F.2d 790, 797-98 (7th Cir. 1985). The Supreme Court's recent opinion addressing this issue at length confirms the evolution described by the Seventh Circuit but suggests that confusion lingers. See Rosemond v. United States, 572 U.S. 65, 76-77, 81 n.10, and 84-89 (Alito, J., dissenting) (2014).

For a controlled substance offense under federal law, § 4B1.2(b) obviously incorporates the scope of aiding and abetting liability under 18 U.S.C. § 2. But for a controlled substance offense under state law, the concept of a "generic" aiding and abetting offense is far from clear. Defendants argue that comparing the scope of Iowa aiding and abetting law to federal law is not enough; we must also consult treatises, Section 2.06(3)(a) of the Model Penal Code, and survey the laws of forty-five other States.[6] They argue that the "vast majority" of these sources, including federal law as

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[6]The author questions whether the Sentencing Commission intended to limit § 4B1.2(b) in this fashion. When it included "aiding and abetting" offenses in the career offender definition of a "controlled substance offense," the Commission was surely aware that, "because the difference between acting purposefully (when that concept is properly understood) and acting knowingly is slight, this is not a matter of great concern." Rosemond, 572 U.S. at 85 (Alito, J., dissenting) (2014); see Duenas-Alvarez, 549 U.S. at 193 (a more expansive concept of "intent" must "extend significantly beyond the concept as set forth in the cases of other States" to create a

reflected in Judge Hand's opinion in Peoni, establish that "generic" aiding and abetting requires proof that the accomplice intended to promote or facilitate the underlying crime; as Iowa law only requires the lesser "knowledge" *mens rea*, § 124.401 is broader than the guidelines definition of controlled substance offense.

Assuming without deciding that defendants have posited the proper standard, we conclude that Iowa law, as determined by the Supreme Court of Iowa, requires more than mere "knowledge" to convict a defendant of aiding and abetting liability. In 1977, the Supreme Court of Iowa expressly linked its law of aiding and abetting liability to the federal standard articulated in Peoni:

> The underlying precept of aiding and abetting is a requirement that the accessory in some way "associate himself with the venture, that he participate in it as something that he wishes to bring about, that he seek by his action to make it succeed." United States v. Peoni, 100 F.2d 401, 402 (2 Cir. 1938). This precept was satisfied by the evidence in the present case.

State v. Lott, 255 N.W.2d 105, 108 (Iowa 1977). Defendants concede, as they must, that the federal standard reflected in Peoni adopts their "generic" standard of aiding and abetting liability -- intent to promote the underlying crime. See Rosemond, 572 U.S. at 76-77, citing and quoting Nye & Nissen v. United States, 336 U.S. 613 (1949), United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938), Pereira v. United States, 347 U.S. 1 (1954), and Bozza v. United States, 330 U.S. 160 (1947). In numerous

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state crime that is outside the generic definition of a listed crime in a federal statute). Thus, I conclude that the Commission's simple inclusion of "aiding and abetting" offenses in Application Note 1 is best viewed as a decision that the slight *mens rea* difference between knowing and intentional participation in a drug offense does not affect whether a conviction was for an offense "that prohibits" that conduct. See United States v. Liranzo, 944 F.2d 73, 78-79 (2nd Cir. 1991) ("the [Sentencing] Commission could not anticipate definitional deviations in state law from the 'classic terminology' of 'aiding and abetting'").

other cases, the Supreme Court of Iowa has confirmed and applied the intent standard in Lott. See State v. Henderson, 908 N.W.2d 868, 876 (Iowa 2018); State v. Allen, 633 N.W.2d 752, 754-56 (Iowa 2001); State v. Tangie, 616 N.W.2d 564, 573-74 (Iowa 2000); State v. Lewis, 514 N.W.2d 63, 66 (Iowa 1994); see also State v. Gordon, 531 N.W.2d 134, 136-37 (Iowa App. 1995).

These cases establish that the Iowa law of aiding and abetting liability is substantially equivalent to, not meaningfully broader than, the standard adopted by federal courts in applying 18 U.S.C. § 2 and urged by defendants in these appeals. Both require that the defendant have knowledge of the circumstances constituting the charged offense *and* actively "participate in it as something that he wishes to bring about." Lott, 255 N.W.2d at 108 (quoting Peoni, 100 F.2d at 402). Here, each defendant failed to show a realistic probability that Iowa would apply § 124.401 to conduct that falls outside these cases defining aiding and abetting liability, for example, by "point[ing] to his own case or other cases in which the state courts in fact did apply the statute" in the manner they urge. Duenas-Alvarez, 549 U.S. at 193. Accordingly, the district courts properly applied the career offender guidelines enhancement in sentencing Vasey, Fisher, and Green.

V. Conclusion.

For the foregoing reasons, the judgment of the district court in each of the five cases is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2248

United States of America

Plaintiff - Appellee

v.

Justin Scott Vasey

Defendant - Appellant

Appeal from U.S. District Court for the Southern District of Iowa - Des Moines
(4:17-cr-00082-RGE-1)

JUDGMENT

Before LOKEN, GRASZ and STRAS, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

July 08, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2248

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Appellee

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(4:17-cr-00082-RGE-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

August 22, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans