NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

Demetrius Marcellus Green - 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 categorical approach is required to determine if a State conviction qualifies as a "felony drug offense" under the Controlled Substances 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. Green, 6:17-cr-02083 (N.D. Iowa) (criminal proceedings), judgment entered May 31, 2018.

United States v. Green, 18-2286 (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. Robert Fisher, 18-2562 (8th Cir.) (direct criminal appeal), judgment entered July 8, 2019, rehearing denied August 22, 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. 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

Federal Cases

Federal Statutes

State Cases

State Statutes

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The petitioner, Demetrius Green, 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. 18-2286, entered July 8, 2019. Mr. Green filed a petition for rehearing en banc and petition for rehearing by the panel. Mr. Green'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. Green'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. § 802(44)

> The term "felony drug offense" means 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, marijuana, anabolic steroids, or depressant or stimulant substances.

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

On September 3, 2017, Mr. Green's girlfriend called law enforcement to report a domestic dispute. (PSR ¶ 4).[1] His girlfriend reported that Mr. Green had left the residence carrying a black bag that contained firearms. (PSR ¶ 4). Law enforcement responded and found Mr. Green two houses away from his residence. (PSR ¶ 5). Law enforcement also recovered a black bag inside of a trashcan near Mr. Green's location. (PSR ¶ 6). Inside of the bag was two firearms, ammunition, marijuana packaged for individual sale, a digital scale, and cash. (PSR ¶ 6). Law enforcement searched the residence and found ammunition. (PSR ¶ 6). Text messages on Mr. Green's phone were indicative of the sale of marijuana. (PSR ¶ 7).

Based on this conduct, Mr. Green was indicted in the Northern District of Iowa on one count of possession of marijuana with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(D), one count of possession of firearms during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A), and one count of possession of a firearm and ammunition by a felon, in violation of 18 U.S.C. §§ 922(g) and 924(a)(2). (DCD 2). The indictment also included a notice of a 21

[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 Northern District of Iowa Case No. 6:17-cr-02083, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Northern District of Iowa Case No. 6:17-cr-02083.

U.S.C. § 851 enhancement, asserting Mr. Green had a prior conviction for a felony drug offense. (DCD 2). Mr. Green pleaded guilty to counts 1 and 2, pursuant to a plea agreement. (DCD 22).

A presentence investigation report (PSR) was prepared. The PSR asserted that Mr. Green was a career offender under count 1, increasing his offense level by 18 levels and also increasing his criminal history category. (PSR ¶ 18, 38, 39). The PSR identified two convictions under Iowa's controlled substance statute, Iowa Code § 124.401, for possession of marijuana with intent to distribute, as controlled substance offenses under the guidelines. (PSR ¶ 27, 30). These convictions were also identified as "felony drug offenses" under 21 U.S.C. § 851. (PSR ¶ 27, 30). The PSR noted that count 2, the § 924(c) conviction, carried a five-year mandatory minimum that must run consecutively to any other term of imprisonment. (PSR ¶ 72).

Because Mr. Green was a career offender and convicted of a § 924(c) charge, his range pursuant to USSG § 4B1.1(c)(3) was 262 to 327 months of imprisonment. (PSR ¶ 72). Without the career offender finding, Mr. Green's guideline range was 77 to 96 months of imprisonment. (PSR ¶ 72).

Mr. Green objected to the finding that he was career offender. (DCD 28). 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 28, 36). He also argued that these convictions did not qualify as felony drug offenses under §

851 based on *Valdivia-Flores*. (DCD 28, 36). Mr. Green argued that under the reasoning of *Valdivia-Flores*, his convictions were not controlled substance offenses or felony drug 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. Green 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. Green's Iowa convictions were not controlled substance offenses or felony drug offenses. The government resisted, arguing that *Valdivia-Flores* did not apply to the analysis. (DCD 37).

At sentencing, the district court overruled the objection and found that Mr. Green was a career offender. (Sent. Tr. p. 7-10). The court also overruled the challenges to the § 851 predicates. (Sent. Tr. p. 7-10). The court noted that the argument was "fascinating" and that it had "a good chance of success at the appellate court level." (Sent. Tr. p. 9).

The court calculated Mr. Green's guideline range as 262 to 327 months of imprisonment, based on a total offense level of 31 and criminal history category VI. (Sent. Tr. p. 10). The district court sentenced Mr. Green to 72 months on count one, to run consecutively to the 60 months on count two, for a total of 132 months of imprisonment. (Sent. Tr. p. 26-27). The court concluded by stating that if it erred in calculating Mr. Green's guideline range, that it wanted the opportunity to resentence Mr. Green. (Sent. Tr. p. 30).

Mr. Green appealed to the Eighth Circuit, maintaining his argument that his Iowa convictions were not felony drug offenses or controlled substance offenses. 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. Green'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 felony drug offenses. *Id.* at 936-37. The court found that the use of the phrase "relating to" meant that no specific *mens rea*

[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.

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.*

Turning to the controlled substance offense issue, the Eighth Circuit determined that Iowa aiding and abetting was broader than generic aiding and abetting. *Id*. at 938-40. The Circuit assumed without deciding that generic aiding and abetting requires 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. Green'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*.

[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).

Mr. Green 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 "felony drug offense." Instead, the court set a vague standard for determining whether an offense is a felony drug offense that will prove difficult for judges and practitioners to apply uniformly moving forward.

With this decision, the Eighth Circuit Court of Appeals entered a growing circuit split on whether the categorical approach is necessary to determine whether a prior State conviction is a "felony drug offense." *See United States v. Aviles*, 938 F.3d 503, 511 (3d Cir. 2019) (applying the categorical approach to determine whether the defendant's prior convictions were felony drug offenses); *United States v. Elder*, 900 F.3d 491 (7th Cir. 2018) (finding a generic definition for "felony drug offense" and engaging in the categorical approach); *United States v. Ocampo-Estrada*, 873 F.3d 661, 667 (9th Cir. 2017) (applying the categorical approach); *but see United States v. Hayes*, 736 F. App'x, 719, 722-23 (10th Cir. 2018) (noting the court has not applied the categorical approach and instead taking a "less formal

approach" to determine if a prior conviction is a felony drug offense). This Court should grant cert to resolve this split.

Finally, 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 qualified. This also conflicts with how other circuits handle the interpretation of state law when state law is unclear.

I. THE CATEGORICAL APPROACH IS NECESSARY TO DETERMINE WHETHER A PRIOR CONVICTION IS A FELONY DRUG OFFENSE.

First, the Eighth Circuit determined an aiding and abetting comparison was unnecessary to determine if Mr. Green's prior conviction was a felony drug offense. The court relied upon the "related to" language under the felony drug offense definition. This Court rejected this exact finding in *Mellouli v. Lynch*.

In *Mellouli*, the Supreme Court held a State law prohibiting possessing drug paraphernalia was not a law "relating to" a controlled substance when the State statute did not require any connection with a federally controlled substance. 135 S. Ct. 1980 (2015). While recognizing "relating to" is a "broad and indeterminate" phrase, the Court concluded disconnecting the definition from federally controlled substances would "stretch[]" the statute "to the breaking point." *Id*. at 1990.

"Indeed," the Court reasoned, "the Government's position might well encompass convictions for offenses related to drug activity more generally, such as gun possession, even if those convictions do not actually involve drugs (let alone federally controlled drugs)." *Id*. Thus, the Court reasoned the context of the statute called for a "narrower reading" of "relating to" than the words alone might otherwise support, and held a connection to a federally controlled substance is required. *Id*. The Eighth Circuit's opinion here attempts to rely on similar "related to" language to reinstate a vague standard that the Supreme Court already rejected in *Mellouli*.

Other courts have determined that this Court's precedent requires the categorical approach. For example, the Seventh Circuit in *Elder* recognized that the logic applied in *Taylor* to the violent felony analysis should apply here. 900 F.3d 491 (7th Cir. 2018). The Seventh Circuit noted that 21 U.S.C. § 841(b)(1) refers to a "prior *conviction* for a felony drug offense." *Id*. at 499. "This terminology supports the view that 'Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior conviction.'" *Elder*, 900 F.3d at 499 (quoting *Taylor*, 495 U.S. at 600).

In addition, requiring the categorical approach also protects a defendant's Sixth Amendment rights—a major concern in *Taylor*. *Id*. at 500. "Allowing a sentencing court to determine, on the basis of its own factfinding, that a

defendant's prior conviction 'relat[ed] to narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances," § 802(44), raises the very Sixth Amendment concerns against which [this Court] repeatedly has warned in applying recidivism statutes." *Id.*

Finally, if the Eighth Circuit's analysis for felony drug offenses stands, the question moving forward will be—what does the standard adopted even mean? There is not a "generic" definition, as mandated by *Taylor*. As this Court in *Mellouli* worried, what offense does not relate to drug manufacturing? The Eighth Circuit's decision expands the definition of felony drug offense without any discernable limit and must be rejected.

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.[4] 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—that Iowa aiding and abetting is not overbroad. However, the court ignored Iowa

[4] The Court did engage in the categorical approach to address Mr. Green's Guideline argument. He asserts it also applies to his felony drug offense challenge.

case law that only requires aiders and abettors to knowingly 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 F. 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. Green respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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