NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20__

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Edward Steven Feeney, Jr. - Petitioner,

vs.

United States of America - Respondent.

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On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

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# 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

*Erwin Bell v. United States*, 19-6672 (Sup. Ct.) Petition for Writ of Certiorari filed on November 15, 2019.

*Dalton Betsinger v. United States*, 19-6862 (Sup. Ct.) Petition for Writ of Certiorari filed on December 3, 2019.

*Kyle Boleyn v. United States*, 19-6671 (Sup. Ct.) Petition for Writ of Certiorari filed on November 15, 2019.

*United States v. Edward Steven Feeney, Jr.,* 18-3023 (direct criminal appeal), judgment entered October 21, 2019, affirmed.

*United States v. Edward Steven Feeney, Jr.,* 3:17-cr-00052 (criminal proceeding), judgment entered September 13, 2018 and amended judgment entered on December 5, 2019.

*Robert Fisher v. United States*, 19-6688 (Sup. Ct.) Petition for Writ of Certiorari filed on November 15, 2019.

*Demetrius Green v. United States*, 19-6687 (Sup. Ct.) Petition for Writ of Certiorari filed on November 15, 2019.

*Justin Vasey v. United States*, 19-6677 (Sup. Ct.) Petition for Writ of Certiorari filed on November 15, 2019.

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The petitioner, Edward Feeney, Jr., 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. 18-3023, entered on October 21, 2019.

## OPINION BELOW

On October 21, 2019, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The decision is unpublished and available at 780 F. App'x 393.

## JURISDICTION

The Court of Appeals entered its judgment on October 21, 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

On January 18, 2017, law enforcement officers attempted to initiate a traffic stop of the vehicle Mr. Feeney was driving. (PSR ¶ 13).[1] Mr. Feeney fled. (PSR ¶ 14). Eventually, law enforcement was able to stop Mr. Feeney's vehicle. (PSR ¶ 14). He then fled on foot, but was soon after apprehended. (PSR ¶ 14). Law enforcement searched his vehicle, which revealed 118.8 grams of actual methamphetamine, a digital scale, plastic baggies, and drug paraphernalia. (PSR ¶ 17).

Based on this conduct, Mr. Feeney 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). The government filed notice pursuant to 21 U.S.C. § 851 that Mr. Feeney had one or more prior felony drug convictions, and was therefore subject to enhanced statutory penalties. (DCD 9).

Eventually, Mr. Feeney pled guilty to the sole count, pursuant to a plea agreement. (DCD 50). In the plea agreement, Mr. Feeney agreed to the application of one enhancement under § 851, increasing his statutory mandatory minimum to

[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. 3:17-cr-00052, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 3:17-cr-00052.

twenty years of imprisonment. (DCD 50). The government agreed to withdraw the remaining § 851 enhancements. (DCD 50).

A presentence investigation report (PSR) was prepared. The PSR asserted that Mr. Feeney was a career offender, increasing his offense level by five levels. (PSR ¶ 23). The PSR identified three convictions under Iowa's controlled substance statute, Iowa Code § 124.401, as controlled substance offenses under the guidelines: (1) possession of methamphetamine with intent to manufacture, (2) possession of methamphetamine with intent to deliver, and (3) conspiracy to manufacture methamphetamine. (PSR ¶¶ 38, 41, 44). The PSR calculated Mr. Feeney's advisory range at 262 to 327 months of imprisonment, based upon a total offense level of 34 and criminal history category VI. (PSR ¶ 116).

Mr. Feeney objected to the finding that he was a career offender and objected to the narratives of these convictions. (DCD 58, 65). 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 58, 65). Specifically, he argued that under *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. In *Valdivia-Flores*, the Ninth Circuit analyzed whether a Washington conviction was an aggravated felony. *Id.* The 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. Feeney 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. Feeney's Iowa convictions were not controlled substance offenses. Mr. Feeney argued his correct range was 240 months of imprisonment, the statutory mandatory minimum. (DCD 65).

The government resisted, arguing that the Eighth Circuit held that Iowa controlled substance offense convictions were controlled substance offenses under *United States v. Maldonado*, 894 F.3d 893 (8th Cir. 2017). (DCD 66). The government asserted that *Maldonado* controlled. (DCD 66).

At sentencing, the district court overruled the objection and found that Mr. Feeney was a career offender. (Sent. Tr. pp. 12-14). The court sentenced Mr. Feeney to 262 months of imprisonment. (Sent. Tr. p. 29). In doing so, the court stated:

> I do note that the defendant's – as I previously stated – that Category VI is largely a – even if he wasn't a career offender, this is the type of offense conduct that would warrant this sentence based upon the fact that his criminal history is so high and his – the offense conduct is so severe that it is the same sentence I would impose if he was not, in fact, a career offender having considered all of the available options to the Court.

(Sent. Tr. pp. 29-30).

Mr. Feeney appealed to the Eighth Circuit, maintaining his argument that his Iowa convictions were not controlled substance offenses and he was not a career offender. While Mr. Feeney's case was pending, the Eighth Circuit heard oral

argument on five cases[2] raising this argument or similar arguments. In a joint opinion, the Eighth Circuit rejected the argument. *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019).

In *Boleyn*, as relevant to Mr. Feeney'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 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 Iowa 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

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[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. Petitions for writ of certiorari were filed on these cases on November 15, 2019. *United States v. Betsinger*, 19-1764, also raised this issue. A petition for writ of certiorari was filed on December 3, 2019 in this case.

[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).

promote or facilitate the underlying offense, overbreadth issues were not present. *Id*.

Therefore, the Eighth Circuit rejected Mr. Feeney's argument, finding *Boleyn* controlling. However, the court did amend his judgment order to reflect the district court's intention to run his federal sentence concurrent with one of his state sentences.

## 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 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 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."). 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 an error. Iowa law establishes that courts routinely only require a knowing *mens rea* for aiding and abetting convictions, including as recently as 2019.

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 a 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. Feeney respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

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