NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM, 20___

Gerard Cliston Ellis - 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

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER

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. Ellis, 3:18-cr-00011 (S.D. Iowa) (criminal proceedings), judgment entered October 18, 2018.

United States v. Ellis, 18-3339 (8th Cir.) (direct criminal appeal), judgment entered November 13, 2019.

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.

Edward Feeney, Jr. v. United States, 19-7520 (Sup. Ct.) Petition for Writ of Certiorari submitted on January 29, 2020.

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, Gerard Ellis, 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. 18-3339, entered on November 13, 2019.

OPINION BELOW

On November 13, 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 The decision is unpublished and available at 784 F. App'x 470.

JURISDICTION

The Court of Appeals entered its judgment on November 13, 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 December 2017 and January 2018, a confidential informant conducted controlled buys from Mr. Ellis's co-defendant, Corey Taylor. (PSR ¶¶ 10-12).[1]

After one of the controlled buys, law enforcement stopped Mr. Taylor's vehicle. (PSR ¶ 12). A subsequent search revealed ice methamphetamine, a firearm, and almost $50,000 in cash. (PSR ¶ 12). After the search, Mr. Taylor told law enforcement that he purchased methamphetamine from "Rod." (PSR ¶¶ 13-14). Rod was later identified as Mr. Ellis. (PSR ¶ 14).

Mr. Taylor then engaged in a controlled buy from Mr. Ellis. (PSR ¶¶ 15-20). Mr. Taylor purchased roughly 400 grams of ice methamphetamine from Mr. Ellis for $7,000. (PSR ¶¶ 15-20). Law enforcement arrested Mr. Ellis after the controlled buy. (PSR ¶ 20).

Based on this conduct, Mr. Taylor and Mr. Ellis were indicted on multiple charges in the Southern District of Iowa. (DCD 17). Mr. Ellis was charged with one count of conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) & 846 (count 1) and one count of distribution of a 50 grams of actual

[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. 3:18-cr-00011, and is followed by the docket entry number. "Sent. Tr." refers to the sentencing transcript in Southern District of Iowa Case No. 3:18-cr-00011.

methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) (count 10). (DCD 17).

Eventually, Mr. Ellis pled guilty, pursuant to a plea agreement. (DCD 40). Mr. Ellis pled guilty to count 10, with the government to dismiss count 1 at sentencing. (DCD 40). The government also agreed to not file any § 851 enhancements. (DCD 40).

A presentence investigation report (PSR) was prepared. The PSR asserted that Mr. Ellis's base offense level was 38, because the offense involved 4.5 kilograms or more of "ice" or actual methamphetamine. (PSR ¶ 32). The PSR also asserted that Mr. Ellis was a career offender. (PSR ¶ 38). Under this guideline, Mr. Ellis's base offense level was calculated at 38. (PSR ¶ 38). The PSR identified two convictions under Iowa's controlled substance statute, Iowa Code § 124.401, as controlled substance offenses under the guidelines: (1) possession of cocaine base with intent to deliver, and (2) delivery of cocaine base. (PSR ¶¶ 38, 51, 53). With or without the career offender enhancement, Mr. Ellis's criminal history category was VI. (PSR ¶¶ 58-59).

Mr. Ellis objected to the base offense level. First, he objected to the quantity determination, and asserted that his correct base offense level based upon quantity was 32. (DCD 53). He also objected to the finding that he was a career offender, and objected to the narratives of these convictions. (DCD 53, 63). He argued that his two convictions did not qualify as controlled substance offenses based on *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017). (DCD 53, 63). Specifically, 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. In *Valdivia-Flores*, the Ninth Circuit analyzed whether a Washington conviction was an aggravated felony. *Id.* 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. Ellis 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. Ellis's Iowa convictions were not controlled substance offenses.

At sentencing, the parties agreed that if the career offender enhancement did not apply, the correct base offense level based upon drug quantity was 36 (not 38). (Sent. Tr. p. 3). Mr. Ellis maintained his objection to the career offender enhancement. (Sent. Tr. p. 4). The district court overruled the objection and found that Mr. Ellis was a career offender. (Sent. Tr. p. 4). The district court applied the career offender guideline, and calculated Mr. Ellis's range as 262 to 327 months of imprisonment, based upon a total offense level of 34 and criminal history category VI. (Sent. Tr. p. 5). The court then sentenced Mr. Ellis to 240 months of imprisonment. (Sent. Tr. p. 13).

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

As relevant to Mr. Ellis's case, 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 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

[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 November 15, 2019.

[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).

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*.

Based upon *Boleyn*, the Eighth Circuit rejected Mr. Ellis's challenge to his career offender status. *United States v. Ellis*, 784 F. App'x 470 (8th Cir. 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 circuit 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 confusing.

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 an 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 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. Ellis respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,

/s/ Heather Quick

Heather Quick
Assistant Federal Public Defender
222 Third Avenue SE, Suite 290
Cedar Rapids, IA 52401
TELEPHONE: 319-363-9540
FAX: 319-363-9542

ATTORNEY FOR PETITIONER