

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2018

ERIC DANIEL DOYLE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY R. GALLAGHER
Federal Defender for the District of Montana
*ANDREW NELSON
Assistant Federal Defender
Federal Defenders of Montana
125 Bank St., Ste. 710
Missoula, Montana 59802-9380
(406) 721-6749
*Counsel of Record

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QUESTION PRESENTED

Whether due process requires the correct calculation of Doyle's Guidelines sentencing range.

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

Eric Daniel Doyle petitions for a Writ of Certiorari to review the United States Court of Appeals for the Ninth Circuit's order dismissing his appeal on waiver grounds.

JURISDICTION

The court of appeals issued its order dismissing Doyle's appeal on March 14, 2019. Appendix A. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

United States Court of Appeals for the Ninth Circuit issued an order dismissing Doyle's appeal. The order is attached as Appendix A.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States. Appendix B. This case involves Chapter 3, Part D and Chapter 5, Part G of the United States Sentencing Guidelines. Appendix C.

STATEMENT OF THE CASE

The United States charged Doyle with 44 firearms-related felony counts. Prior to Doyle's arrest, his four co-defendants each pled to a superseding information charging much less serious offenses. All four co-defendants received minimal sentences ranging from time-served to five years of probation. Doyle was apprehended and eventually arraigned and detained in Missoula.

Doyle entered into a plea agreement that called for guilty pleas to two counts of illegal export of firearms and one count of felon in possession of firearms. The plea agreement contained a waiver provision:

8. Waivers:

(a) The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). The defendant agrees that if the Court accepts the plea agreement, and the sentence imposed is not more than 240 months of incarceration, the defendant waives the right to appeal any aspect of the sentence, including conditions of probation or supervised release imposed by the Court.

The Presentence Investigation Report (PSR) set the Guidelines sentencing range at 360 months – the total of the statutory maximum of 120 months for each of the three counts of conviction. Doyle objected to the calculation of the Guidelines sentencing range.

Doyle argued that the Guidelines sentencing range is grounded on the most serious count, the felon in possession count. Doyle argued that multiple counts could impact the offense level through Chapter 3 grouping principles, but that no increase resulted according to the PSR. Doyle argued that USSG § 5G1.1(a) dictates that the Guidelines range should be 120 months; at criminal history category VI and total offense level 40 Doyle fell at 360 months to life on the guideline sentencing table. USSG § 5G1.1(a) then provides that the statutory maximum of 120 months becomes the Guidelines sentence. Doyle argued that the Chapter 5 concept of total punishment focused mainly on how to structure a sentence for multiple counts but provided little guidance as to the properly calculated Guidelines sentencing range

and imposition of a reasonable sentence. Finally, Doyle noted the incongruity between the potential (360 to life before adjustment) guideline range for the felon in possession count and the statutory maximum of 120 months, an incongruity underscored by the offense level on the illegal export counts being capped at 26 for a guideline range of 92 to 115 months.

The district court overruled Doyle's objection to the Guidelines calculation. The district court determined the combined length of the sentences on multiple counts (the "total punishment" pursuant to USSG § 5G1.2) and imposed a custodial sentence of 180 months – 60 month concurrent sentences on the illegal export convictions, Counts 1 and 9, and a consecutive 120 month sentence for Count 14, felon in possession of a firearm. The district court conflated the cumulative statutory maximum for all three counts with the Guidelines sentencing range, which is a function of the single most serious count as restricted by the statutory maximum attending that count pursuant to USSG § 5G1.1(a). The objection was discussed at length during the sentencing hearing.

On appeal, Doyle argued that there is no authority for setting the Guidelines sentencing range at 360 months. Because the guideline range for the most serious count exceeded the statutory maximum sentence, USSG § 5G1.1(a) instructs that the statutory maximum of 120 months becomes the Guidelines sentencing range.

The district court relied on the nebulous and uninstructive concept of total punishment and justified the 180 month sentence imposed as authorized by statute because the sentence for each count of conviction was within the confines of the statutory maximum sentence. Total punishment, however, primarily addresses how sentences on multiple counts are structured – it exists only in the mind of the sentencing court prior to imposition of sentence and provides no meaningful starting point in the sentencing analysis. Moreover, the Application Notes to USSG § 5G1.2 prescribe the precise order in which the various factors are to be considered in calculating the Guidelines sentencing range. Total punishment is determined after determining both the offense level (which is impacted by Chapter 3 grouping principles for multiple counts) and then the “defendant’s guideline range on the Sentencing Table.”

The question presented on appeal was not whether the 15 year sentence imposed was authorized by statute. The question was whether the district court committed procedural error by determining the guideline range by adding the 10 year statutory maximum sentences attending each count of conviction – in effect invoking the maximum impact of Doyle’s conviction three times over. The answer is yes – Doyle’s properly calculated Guidelines range is 120 months pursuant to USSG §§ 5G1.1(a) and 5G1.2, Application Notes 1 and 3. Application Note 1

directs the sentencing court to determine the guideline range on the sentencing table before deciding total punishment. Application Note 3 clarifies that the statutory maximum operates to restrict the Guidelines sentencing range not just in single count cases but in multiple count cases.

Doyle further argued on appeal that the bedrock procedural requirement to calculate and begin the sentencing analysis with the correct guideline range implicates procedural due process rights and renders any potential waiver of appeal inapposite. Doyle did not expressly agree to waive the right to challenge the calculation of the Guidelines sentencing range.

PRIOR PROCEEDINGS

The United States charged Doyle by indictment with 13 counts of illegal export and attempted illegal export of firearms pursuant to 18 U.S.C. §§ 554 and 2; one count felon in possession of firearms in violation of 18 U.S.C. § 922(g)(1); one count straw purchase/false statement in connection with a firearms transaction in violation of 18 U.S.C. § 922(a)(6); one count of dealing in firearms without a license in violation of 18 U.S.C. § 922(a)(1)(A); 13 counts of unlawful transfer of firearms to an out-of-state resident in violation of 18 U.S.C. § 922(a)(5); one count of possession of firearms with obliterated serial numbers in violation of 18 U.S.C. § 922(k); and 14 counts of mailing firearms in violation of 18 U.S.C. § 1715.

Four co-defendants were charged in the same indictment: Jeffrey Palmer, Brian Spain, Tanna Meagher, and Jay Isles. The government alleged that Doyle and his co-defendants acquired firearms in the United States, sold them to international buyers over the internet, and shipped them overseas. Spain and Isles each pled guilty to a superseding information charging one count of introducing a firearm into a federal facility in violation of 18 U.S.C. § 930(a). Spain received a two year probationary sentence and a \$2,500 fine. Isles was sentenced to a time-served sentence of imprisonment, fined \$250, and placed on one year of supervised release. Palmer and Meagher each pled guilty to a superseding information charging one count of misprision of a felony in violation of 18 U.S.C. § 4 and received five year sentences of probation.

On November 7, 2017, Doyle was apprehended in Mexico. He made his initial appearance in Tucson, Arizona and was detained. Doyle was arraigned in Missoula, Montana on December 7, 2017 and remained in custody.

Doyle filed a written plea agreement that called for guilty pleas to two counts of illegal export of firearms in violation of 18 U.S.C. § 554 (Counts 1 and 9) and one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1) (Count 14). Doyle pled guilty to those three counts on February 7, 2018.

The Presentence Investigation Report (PSR) set the Guidelines sentencing range at 360 months – the total of the statutory maximum of 120 months for each of the three counts of conviction. PSR ¶ 190. Doyle objected to the calculation of the Guidelines sentencing range.

The district court overruled Doyle’s objection to the calculation of the Guidelines sentencing range. The district court determined the combined length of the sentences on multiple counts (the “total punishment” pursuant to USSG § 5G1.2) and imposed a custodial sentence of 180 months – 60 month concurrent sentences on the illegal export convictions, Counts 1 and 9, and a consecutive 120 month sentence for Count 14, felon in possession of a firearm. Judgment was entered the same day.

Doyle filed his notice of appeal on May 24, 2018.

On January 17, 2019, the United States filed a motion to dismiss Doyle’s appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals granted the motion on March 14, 2019. Appendix A.

FACTUAL BACKGROUND

Because this petition concerns proper calculation of the guideline sentencing range, the relevant facts center on the PSR’s Guidelines range calculation and the district court’s ruling on Doyle’s objection at the sentencing hearing.

The PSR's Guidelines calculation

The PSR calculated the offense level. Because Doyle pled guilty to multiple counts, the PSR first applied the grouping rules described in USSG § 3D1.2.

Pursuant to the grouping rules, all three Counts would group together under USSG 3D1.2(b), because they involved the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan. Count 14 is considered the most serious offense, as it results in the highest guideline calculation. Pursuant to USSG 3D1.3(a), the most serious Count is utilized to complete the Guideline calculation below.

PSR ¶ 90 (emphasis added).

For Count 14 the PSR calculated a base offense level of 20 pursuant to USSG § 2K2.1(a)(4)(A) because Doyle committed the felon in possession offense subsequent to sustaining a felony conviction for a controlled substance offense. PSR ¶ 91. No adjustments were made to the offense level based on grouping principles outlined in Chapter 3.

The PSR applied a host of specific offense characteristics to enhance the offense level – six levels for the offense involving between 25 and 99 firearms pursuant to USSG § 2K2.1 (b)(1)(C) and an additional four levels for altered or obliterated serial number pursuant to USSG § 2K2.1(b)(4)(B). Because the offense level could not exceed level 29 based on subsections (b)(1) through (b)(4), the offense level of 30 was decreased to level 29. *See* PSR ¶¶ 92-94.

The offense level increased by four levels for trafficking in firearms pursuant to USSG § 2K2.1(b)(5). Another four levels were added pursuant to USSG § 2K2.1(b)(6)(A) for shipping and instructing others to ship firearms out of the United States. Two Chapter 3 enhancements were applied in the PSR – four levels for being a leader or organizer of extensive criminal activity pursuant to USSG § 3B1.1(a) and a two-level obstruction of justice enhancement for fleeing to Mexico pursuant to USSG § 3C1.1. *See* PSR ¶¶ 95-99. After the adjustment for acceptance of responsibility and timely notification of plea, the Total Offense Level was 40. PSR ¶¶ 102-104.

The PSR noted that the intersection of the total offense level and criminal history category put Doyle on the guideline sentencing table at a sentence of 360 months to life, acknowledged that USSG § 5G1.1(a) operated to restrict the guideline range to the statutory maximum sentence, but nevertheless set the Guidelines sentencing range at 360 months based on the cumulative statutory maximum for all three counts:

Based upon a total offense level of 40 and a criminal history category of VI, the guideline imprisonment range is 360 months to life. However, the statutorily authorized maximum sentence on each count is 120 months; therefore, the guideline range is 360 months (120 months on each Count). Pursuant to USSG § 5G1.1(a), “Where the statutorily authorized maximum sentence is less than the minimum of

the applicable guideline range, the statutorily authorized maximum sentence shall be the Guideline sentence.”

PSR ¶ 190.

Objection to the Guidelines range and the district court’s ruling

Doyle raised several objections to the PSR’s Guidelines calculation. This appeal concerns the objection to the Guidelines calculation set forth in paragraph 190 quoted above.

The PSR determined that the guideline range was 360 months based on the 120 month statutory maximum for each count. Doyle objected and argued that the Guidelines sentencing range is grounded on the most serious count, Count 14, as acknowledged in the PSR. Doyle argued that multiple counts could impact the offense level through Chapter 3 grouping principles, but that no increase resulted according to the PSR in this case. Doyle argued that USSG § 5G1.1(a) dictates that the Guidelines range should be 120 months; at criminal history category VI and total offense level 40 Doyle fell at 360 months to life on the guideline sentencing table. USSG § 5G1.1(a) then provides that the statutory maximum of 120 months becomes the Guidelines sentence. Doyle argued that the Chapter 5 concept of total punishment focused mainly on how to structure a sentence for multiple counts but provided little guidance as to the properly calculated Guidelines sentencing range

and imposition of a reasonable sentence. Finally, Doyle noted the incongruity between the potential (360 to life before adjustment) guideline range for Count 14 and the statutory maximum of 120 months, an incongruity underscored by the offense level on the illegal export counts being capped at 26 for a guideline range of 92 to 115 months for Counts 1 and 9. *See* PSR ¶ 89.

The district court heard argument on the Guidelines range calculation at the sentencing hearing:

DEFENSE

COUNSEL:

So we've argued, and I think there's not a lot of authority to the contrary, frankly, that the guideline here is the statutory maximum. The relevant part of Chapter 5 is the provision that says where the guideline range exceeds the statutory maximum, the statutory maximum for that offense is the guideline range.

THE COURT:

Yeah, but the guidelines also say that for purposes of punishment, if the statutory maximum, when there are a series of convictions, does not adequately address the question of punishment, then under 5D1 point, whatever, 2(d), I think, then the Court has the authority to run consecutive sentences in order to get up to, in this case, the calculated; at least at this point, the guidelines would be 360 months in prison to life in prison. And I can do that, can't I?

DEFENSE
COUNSEL:

Yes, Judge, but I think those are separate questions, respectfully. I think the operative concept in terms of what you were just discussing is total punishment.

THE COURT: Yes.

DEFENSE
COUNSEL:

No one, I think, could stand here in front of you and dispute the notion that you have the authority to run multiple counts consecutively up to the statutory maximum for each count. That's what the defendant is advised, for example, at the change-of-plea hearing. They're advised that at the arraignment. The face of the indictment tells them what the maximum penalty is for each count.

THE COURT: Um-hmm.

DEFENSE
COUNSEL:

This case, of course, had some 40-odd counts at its inception. We're down to three. So total punishment, those parts of Chapter 5 that talk about that, that's really within the province of the Court.

I think that those are apples and oranges, Judge. The question is, What is the correctly calculated guideline range? And the prefatory language, the concept on which the guidelines are based is that they're driven by the most serious count, which here happens to be Count 14.

Now, to me, the anomaly is how high on the guideline range Mr. Doyle gets on Count 14. I think that underscores a couple things, as we've argued in part in the memorandum. One is I'm not sure the

commission really saw this coming. The difference between the statutory maximum and the potential guideline range on Count 14 is a function of the absurdity, I would say, of 2K2.1 as applied to Mr. Doyle. The export guideline is capped at 26. There is no specific offense characteristics. Nature and number of firearms aren't even taken into account when you consider those counts discretely, on their own.

I think the baseline here is that the parties are talking about two different things. You have the authority, under the law, as anyone understands it, to sentence Mr. Doyle up to 360 months.

Transcript of Sentencing Hearing, pg. 5, ln. 24 to pg. 8, ln. 1.

The district court equated the Guidelines sentencing range with the total statutory maximum sentence for all three counts:

THE COURT: Well, I don't understand the argument. I mean, what if you're right and the guideline is 120 months? That's all it is. Can't go any higher. I can still sentence him to 360 months.

DEFENSE
COUNSEL: Yes.

THE COURT: So what's the point of the argument?

DEFENSE
COUNSEL: Well, you're above the guidelines at that point, Judge, and I think that changes things, certainly potentially at the next level of review. What I know is that cases like *Carty* tell us that the process of

sentencing begins with a correctly calculated guideline range.

THE COURT: Um-hmm.

DEFENSE
COUNSEL: The Court has a procedural duty to do that. I know you know this. So in the first instance, before we go any further and talk about what a reasonable sentence is here, which mixes statutory and guideline concepts, we have to determine what the guideline range is. It's driven by the most serious count. In this particular case, it's absurdly high by reference – in comparison to the statutory maximum on Count 14. The other two counts, as I've said, are much more in line. I believe his guideline there would be 92 to 115 with acceptance, even at Criminal History Category VI.

So I can't explain why Count 14 is an outlier. I'm not on the Sentencing Commission. What I can tell you is that the guidelines are based on figuring out what the guideline sentencing range is based on the most serious count. The concept of total punishment and consecutive sentences is a different animal.

THE COURT: Okay, but now you're confusing me. What was your argument as to when I said, okay, I could – assuming you're right and it's 120 months on each count, but I can still sentence him consecutively.

DEFENSE
COUNSEL: That's not the guideline range, though. Those are two different things.

THE COURT: My point is, what is the point? Because if I can do that, what's the basis of your argument? You have

to say, “Okay, you’re right. The guideline is 120 months on each one of these.”

DEFENSE
COUNSEL: Because the guideline is not 360 months to life here. It’s 120 months.

THE COURT: Yeah. Okay. So that’s what I’m saying. If I accept that argument, on each count it’s 120 months.

DEFENSE
COUNSEL: Yes.

THE COURT: Okay.

DEFENSE
COUNSEL: Well –

THE COURT: Well, your argument is that under the guidelines, it’s offense level of 26 as it relates to those two counts, and it’s – whatever it is.

DEFENSE
COUNSEL: Ninety-two to 115, I think.

THE COURT: Yeah.

DEFENSE
COUNSEL: Yeah.

THE COURT: Um-hmm. If I can sentence him to consecutive terms, what is the point of your argument?

DEFENSE
COUNSEL: You have to calculate the guidelines correctly in the first instance. I don’t know any other way to say it,

Judge. And I don't mean to be glib, but it matters what your determination of the guideline range is.

THE COURT: So what if I say you are correct. Does that mean I cannot sentence him to anything greater than 120 months? That's the statutory –

DEFENSE

COUNSEL:

No. What it means is that would be a variance from the guidelines upward.

THE COURT: No, it wouldn't. If I can sentence him consecutively, I say 120 months on Count 14, and then on the other two counts I say it's 60 months to run consecutively to the 120.

....

THE COURT: So I'm having difficulty understanding. If I assume you are correct, do I have to assume, then, that I cannot sentence him to consecutive terms?

DEFENSE

COUNSEL:

No.

THE COURT: So if you are correct, then why is it a variance if I sentence him to 120 months on Count 14 and 60 months on the other two counts to run consecutively?

DEFENSE

COUNSEL:

Because a sentence of 240 months exceeds the guideline range. The guideline range here is set by the most serious count. In this particular instance, it exceeds the statutory maximum. Chapter 5 directs that it becomes the guideline range. There's magic

in that phrase. If you don't start the sentencing analysis there, I would contend you've committed procedural error from the jump.

No one can dispute that you have the authority to run sentences consecutively. That's a different issue.

THE COURT: Well, we're not talking the same language this morning, Mr. Nelson. I don't understand what you just said. You said you're not disputing that I could sentence him. What is the argument? I'm not tracking it. And I've read your brief, and I thought I understood what you were arguing in your brief. But now you've got me confused. I don't understand what your argument is.

DEFENSE
COUNSEL: It's –

THE COURT: You concede I can sentence him to consecutive terms.

DEFENSE
COUNSEL: But that's not how the guideline range is calculated. They're different things, Judge.

THE COURT: That's what I'm saying. It is a different thing. I'm saying, okay, I'll give you the fact. Assume you're correct on the 120 months.

DEFENSE
COUNSEL: Yeah. Statutory authority to run sentences consecutively up to the maximum is not what cases like *Carty* are talking about the Court doing when they set the guideline range. That's the starting point. If you start at 360 months to life, we're in a

different field. We're in a different universe than if you start at 120 months.

Transcript of Sentencing Hearing, pg. 8, ln. 12 to pg. 13, ln. 2.

The government argued that Guidelines sentencing range was 360 months.

The district court continued to equate the cumulative statutory maximum sentence for all three counts with the Guidelines sentencing range:

THE COURT: Thank you.

I think that the government's position is more persuasive than that of Mr. Nelson. Mr. Nelson is correct as it relates to his argument if, in this case, Mr. Doyle were going to be subject to life in prison or something over 360 months. But that's not the case. And Count 14 and each of the other counts of conviction is 120 months, is the statutory maximum. Therefore, 120 months on each count is the highest that he could be sentenced on each count of conviction. However, the guideline calculation with an offense level of 40 or 38 and a criminal history of VI is 360 months to life. That means I cannot sentence him to more than 360 months.

However, by looking at the calculations and 5G1.2(d), "If the sentence imposed on the count carrying the highest statutory maximum," which is Count 14, "is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment. In all other respects, sentences on all counts shall run concurrently, except to the extent otherwise required by law."

So I think you've made your record. I don't think your position is correct. And, consequently, that objection, which is your tenth objection, is overruled. And I think the presentence report correctly calculates what the sentencing guideline range is, taking into account the offense level 38 or 40 and his criminal history.

Transcript of Sentencing Hearing, pg. 16, ln. 20 to pg. 17, ln. 21.

The district court sustained Doyle's objection to the obstruction of justice enhancement, granted the motion for acceptance of responsibility, and calculated the total offense level as 38. The intersection at category VI resulted in a Guidelines sentencing range of 360 months to life on the sentencing table, tempered by the cumulative statutory maximum for all three counts. As the district court reasoned:

THE COURT: Then, with a 38 total offense level and a criminal history category of VI, by statute on Count 1 he could be incarcerated for zero to ten years; that's 120 months. Count 9, zero to 10 years; 120 months. And, Count 14, zero to 10 years; that's another 120 months.

The guideline range, as we've set forth in the early argument, I've rejected the position of Mr. Nelson, and the guideline range with his criminal history of VI and the offense level of 38 is 360 months to life. However, because the total number of years that he could be incarcerated is 360 months, that sets the upper limit of what the guideline range is.

Transcript of Sentencing Hearing, pg. 33, ln. 2 to ln. 13.

The district court discussed Chapter 3 grouping principles as related to computation of the Guidelines sentencing range. The district court acknowledged both that the grouping of multiple counts did not increase the offense level and that Count 14 should be considered the most serious count for Guidelines purposes. Those acknowledgments, however, did not alter the district court's computation of the Guidelines sentencing range as 360 months.

The district court ultimately imposed a sentence of 180 months, comprised of 120 months on Count 14 and 60 months on Counts 1 and 9, to run concurrently to each other and consecutively to Count 14. The district court also imposed three years of supervised release on each count, with the terms to run concurrently.

The appeal waiver

The plea agreement contained a potential waiver of appeal provision that provided in relevant part:

8. Waivers:

- (a) The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). The defendant agrees that if the Court accepts the plea agreement, and the sentence imposed is not more than 240 months of incarceration, the defendant waives the right to appeal any aspect of the sentence, including conditions of probation or supervised release imposed by the Court.

Plea Agreement.

Defense counsel and the district court discussed the appeal waiver at the tail end of the sentencing hearing:

THE COURT: All right.

Well, tell me about the right to appeal. It's waived, according to the plea agreement. The defendant agrees that if the Court accepts the plea agreement, which I have, and the sentence imposed is not more than 240 months of incarceration, which it is not, then the defendant waives the right to appeal any aspect of the sentence, including conditions of probation or supervised release imposed by the Court. And the defendant also waives his right to challenge the sentence in collateral proceedings under 28 U.S. Code 2255.

DEFENSE
COUNSEL:

Judge, I'm assuming the judgment would be entered today, and I'm assuming Mr. Doyle will direct me to enter notice of appeal. If he does that, the argument would be that the appeal is not based on the sentence; it's based on the calculation of the guidelines.

And as far as we can tell, it's an issue of first impression. I would hope I would not have to make a waiver argument in that instance. It's an issue that should be appealed and should be reviewed.

THE COURT: All right.

DEFENSE

COUNSEL: So we don't, we don't think there's a waiver.

THE COURT: Well, Mr. Doyle, I don't believe you have a right to appeal. However, in the event that there is a way for you to appeal, if you intend to appeal, you must file a written notice of appeal with the Clerk of the United States District Court for the District of Montana, and that must be done within 14 days of today's date. Do you understand that?

THE

DEFENDANT: Yes, sir.

Transcript of Sentencing Hearing, pg. 65, ln. 9 to pg. 66, ln. 13.

REASONS FOR GRANTING THE PETITION

A. Doyle's properly calculated Guidelines sentencing range – the starting point in the sentencing analysis – is 120 months.

Doyle argues that his properly calculated Guidelines sentencing range is 120 months. The question presented is not whether the 15 year sentence imposed was authorized by statute. The question is whether the district court committed procedural error, and violated Doyle's due process rights, by determining the guideline range by adding the 10 year statutory maximum sentences attending each count of conviction. The answer is yes – Doyle's properly calculated Guidelines range was 120 months pursuant to USSG §§ 5G1.1(a) and 5G1.2, Application Notes 1 and 3. Application Note 1 directs the sentencing court to determine the guideline

range on the sentencing table before deciding total punishment. Application Note 3 clarifies that the statutory maximum operates to restrict the Guidelines sentencing range not just in single count cases but in multiple count cases.

The district court enjoyed the statutory authority to impose a 360 month sentence. But that recognition fails to address the threshold question: what is the properly calculated Guidelines sentencing range? The district court miscalculated the Guidelines sentencing range by conflating the statutorily authorized maximum sentence with the Guidelines sentencing range benchmark.

“Total punishment” as defined in USSG §§ 5G1.2(b), (c), (d) and Application Note 1 provides guidance as to how a sentence of imprisonment on multiple counts should be structured. Not how the Guidelines sentencing range benchmark is calculated in the first instance. Total punishment is a nebulous Guidelines construct existing primarily in the mind of the sentencing court that does not guide the district court in fulfilling its core sentencing mission. Just as significantly, USSG § 5G1.2 prescribes that total punishment is to be determined after determination of the guideline sentencing range and USSG § 3D1.5 clarifies that total punishment is determined by reference to the combined offense level, a number that relates to the single most serious count as potentially enhanced by multiple counts.

By adopting the PSR's reasoning and setting the Guidelines sentencing range at 360 months, the district court committed procedural error which requires that the sentence be vacated and Doyle be resentenced.

1. USSG § 5G1.1(a) instructs that the statutory maximum sentence shall be the guideline sentence.

The Guidelines are driven by the most serious count. Where the guideline range on that single count exceeds the statutory maximum sentence, USSG § 5G1.1(a) provides guidance:

(a) Where the statutorily authorizes maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence.

USSG § 5G1.1(a).

Guidelines commentary clarifies that this practice of equating the statutory maximum and the guideline sentencing range where that range exceeds the statutory maximum applies equally to multiple counts of conviction. The guideline range on the Sentencing Table can be restricted by the statutory maximum sentence not only in a single count case but “also in a multiple count case.” *See* USSG § 5G1.2, Application Note 1, Application Note 3.

Each of Doyle's three counts of conviction carry a 10 year maximum sentence of imprisonment. The PSR and the district court correctly considered the most

serious offense to be Count 14. PSR ¶ 90. However, when the statutorily authorized sentence is less than the minimum of the applicable guideline range, the statutory maximum sentence “shall be” the guideline range. USSG § 5G1.1(a). The potential sentencing range for Count 14 is 360 months to life. PSR ¶ 190. The statutory maximum sentence for felon in possession is 10 years, or 120 months. Accordingly, USSG § 5G1.1(a) dictates a Guidelines sentencing range of 120 months.

2. Chapter 3 grouping principles – the way the Guidelines account for multiple counts of conviction – do not alter Doyle’s offense level.

The calculation of the Guidelines sentencing range is grounded on the range attending the most serious count of conviction: “[t]he most serious offense is used as the starting point. The other counts determine how much to increase the offense level.” USSG Chapter 3, Part D – Multiple Counts, Introductory Commentary. The purpose of Part D is “to provide incremental punishment for significant additional criminal conduct.” USSG Chapter 3, Part D, Introductory Commentary.

Multiple counts of conviction, then, impact calculation of the Guidelines sentencing range by incremental increase to the offense level. This foundational principle informs grouping of closely related counts. *See* USSG §§ 3D1.1 - 3D1.3. The PSR grouped all three counts of conviction pursuant to USSG § 3D1.2(b), “because they all involved the same victim and two or more acts or transactions

connected by a common criminal objective or constituting part of a common scheme or plan.” PSR ¶ 90; USSG § 3D1.2(b). Doyle’s offense level did not increase.

3. Total punishment does not inform calculation of the sentencing range.

Application Note 1 to USSG § 5G1.2 directs that the combined length of the sentences (“total punishment”) is determined by the court after “determining the adjusted combined offense level and the Criminal History Category and determining the defendant’s guideline range on the Sentencing Table in Chapter Five, Part A (Sentencing Table).” USSG § 3D1.5 clarifies that the combined offense level – a function of the most serious count as potentially increased by multiple counts – is used to determine the total punishment.

The Sentencing Commission requires that the Guidelines sentencing range account for the relevant factors in a particular order. Order matters; like a recipe for soup, Application Note 1 prescribes not just the ingredients (salt, pepper, thyme, oregano; adjusted combined offense level, Criminal History Category, guideline range on the Sentencing Table, total punishment) but the order in which those ingredients are added to the mix. Application Note 1 expressly directs that total punishment is determined after fixing the guideline range on the Sentencing Table.

Pursuant to the recipe provided by the Commission, the properly calculated Guidelines sentencing range in this case is 120 months. Count 14 provides for a

potential Guidelines range of 360 months to life. However, USSG § 5G1.1(a) instructs that because that range exceeds the statutory maximum, the statutory maximum “shall be” the guideline sentence. USSG § 5G1.2, Application Note 3 instructs that this restriction by the statutory maximum sentence applies in multiple count cases like this one. Chapter 3 contemplates a potential offense level increase based on multiple counts of conviction, but application of Chapter 3 grouping principles did not result in an increase to Doyle’s offense level. Application Note 1 to USSG § 5G1.2 directs that the sentencing range on the table is determined before the sentencing court determines the total punishment and USSG § 3D1.5 clarifies that total punishment is determined by reference to the combined offense level.

The nebulous concept of total punishment plays no meaningful role in the sentencing range calculus. The concept provides almost no guidance in determining a reasonable sentence. It primarily provides direction on how to structure a multiple-count sentence. *See* USSG §§ 5G1.2(b)-(d). The total punishment determination is antecedent and does not set the Guidelines sentencing range benchmark.

4. Failure to correctly calculate the Guidelines is procedural error.

The district court wrestled with the practical impact of Doyle’s objection to the Guidelines sentencing range calculation. The district court essentially wanted to know why it mattered. If the sentencing court enjoys the power to run sentences on

multiple counts consecutively, and the authority to sentence up to the statutory maximum sentence on each count, then what is the point of the objection?

The Guidelines sentencing range sets the benchmark and represents the starting point in determining a reasonable sentence, a process that is central to uniformity and fairness in sentencing. As Justice Sotomayor has explained:

Each year, thousands of individuals are sentenced to terms of imprisonment for violations of federal law. District courts must determine in each case what constitutes a sentence that is sufficient, but not greater than necessary to achieve the overarching sentencing purposes of retribution, deterrence, incapacitation, and rehabilitation. Those decisions call for the district court to exercise discretion. Yet, to ensure certainty and fairness in sentencing, district courts must operate within the framework established by Congress.

Rosales-Mireles v. United States, 138 S.Ct. 1897, 1903 (2018) (internal citations and quotations omitted).

The Guidelines range serves as the starting point and the initial benchmark in imposing a reasonable sentence. *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008)(en banc). “[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh v. United States*, 569 U.S. 530, 541 (2013) (quoting *Gall v. United States*, 552 U.S. 38, 50, n. 6 (2007); emphasis in original). While district courts are not bound by the Guidelines, they serve as “a meaningful benchmark” in the initial determination of a sentence and “through the process of appellate review.” *Peugh*, 569 U.S. at 541.

“Of course, to consult the applicable Guidelines range, a district court must first determine what that range is.” *Rosales-Mireles*, 138 S.Ct. at 1904.

The 180 month sentence imposed would have constituted a statutory variance upward had the Guidelines sentencing range been properly calculated at 120 months. Conversely, the 180 month sentence imposed represented a downward statutory variance to a sentence that was only half of the guideline range calculated by the district court. That difference makes it impossible to say whether the district court would have considered a 180 month sentence reasonable by reference to the properly calculated Guidelines range.

A district court commits procedural error when it miscalculates the Guidelines range. *United States v. Ressam*, 593 F.3d 1098, 1116 (9th Cir. 2010) (citing *Carty*, 520 F.3d at 993); *see also Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016) (defendant can rely on application of incorrect Guidelines range to show effect on substantial rights). No meaningful sentencing analysis can occur without proper calculation of the Guidelines sentencing range. It matters for Doyle. To begin the sentencing analysis at a figure three times greater than the properly calculated Guidelines benchmark puts Doyle in a different sentencing universe.

5. Failure to correctly calculate the Guidelines is a denial of due process.

Due process applies to criminal sentencing. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The Guidelines sentencing range sets the benchmark and represents the starting point in determining a reasonable sentence, a process that is central to uniformity and fairness in sentencing. *See Rosales-Mireles*, 138 S.Ct. at 1903. “[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.” *Peugh*, 569 U.S. at 541 (quoting *Gall*, 552 U.S. at 50, n. 6). While district courts are not bound by the Guidelines, they serve as “a meaningful benchmark” in the initial determination of a sentence and “through the process of appellate review.” *Peugh*, 569 U.S. at 541. “Of course, to consult the applicable Guidelines range, a district court must first determine what that range is.” *Rosales-Mireles*, 138 S.Ct. at 1904. A district court commits procedural error – and, Doyle argues, violates due process – when it miscalculates the Guidelines range. *Ressam*, 593 F.3d at 1116 (citing *Carty*, 520 F.3d at 993); *see also Molina-Martinez*, 136 S.Ct. 1338.

6. The waiver provision does not encompass and preclude direct appeal of the district court's Guidelines determination.

“[A] defendant's waiver of his appellate rights is enforceable if (1) the language of the waiver encompasses his right to appeal on the grounds raised, and (2) the waiver is knowingly and voluntarily made.” *United States v. Charles*, 581 F.3d 927, 931 (9th Cir. 2009) (quoting *United States v. Jeronimo*, 398 F.3d 1149, 1153 (9th Cir. 2005) (internal quotation marks omitted).

The plea agreement contained the following language:

The defendant understands that the law provides a right to appeal and collaterally attack the sentence imposed in this case. 18 U.S.C. § 3742(a). The defendant agrees that if the Court accepts the plea agreement, and the sentence imposed is not more than 240 months of incarceration, the defendant waives the right to appeal any aspect of the sentence, including conditions of probation or supervised release imposed by the Court.

Doyle argues that the appeal waiver should not bar correct computation of the Guidelines sentencing range. The waiver language in the plea agreement implicates Doyle's right to appeal his sentence. The notice of appeal clarified that Doyle appeals from the judgment. Appellate jurisdiction here is based on 28 U.S.C. § 1291, not 18 U.S.C. § 3742.

“Judgment” does not mean “sentence.” See *United States v. Spear*, 753 F.3d 964 (9th Cir. 2014). In *Spear*, the panel analyzed a similar waiver provision and held that it was applicable only to an appeal from the sentence imposed. “The

language of the waiver provision supports Spear’s position. The first sentence refers to Spear’s ‘right to appeal the sentence imposed,’ signaling that the entire waiver concerns sentencing.” *Spear*, 753 F.3d at 967.

Terms in plea agreements are to be construed by considering their common legal usage. *See United States v. Streich*, 560 F.3d 926, 930 (9th Cir. 2009); *United States v. Speelman*, 431 F.3d 1226, 1230-31 (9th Cir. 2005). This Circuit has concluded that common legal usage of the term “sentence” generally refers to the punishment imposed on a criminal wrongdoer. *Spear*, 753 F.3d at 969-70. (“For example, in *Joyce*, we concluded that under § 3742(a)(3) the term “sentence” meant “fines, periods of imprisonment and supervised release, and mandatory and special conditions of supervised release.”). (Internal citation omitted).

Spear specifically addressed whether the term “sentence” in the waiver provision should be interpreted to mean “judgment” and held that it should not. *Id.* at 969 (“We reject the government’s contention that, because the waiver language tracks and cites 18 U.S.C. § 3742, the term “sentence” should be interpreted to mean “judgment,” which encompasses the conviction by implication.”); *see also id.* at 970, n. 5 (“In fact, Corey also used “sentence” according to its common legal usage by explaining that after a defendant pleads guilty or is convicted by a factfinder, ‘[a] judgment of conviction setting forth the sentence is then entered.’ 375 U.S. at 171,

(emphasis added). Because the sentence – that is, the quantum of punishment – is set forth in the judgment, the two terms are not synonymous.”).

Spear is controlling. The plea agreement waiver implicates only Doyle’s right to appeal the sentence. The waiver provision in the plea agreement does not limit his right to appeal the district court’s miscalculation of the Guidelines sentencing range, which is encompassed by the judgment.

The Ninth Circuit has enforced an appeal waiver where the defendant challenged the calculation of the Guidelines sentencing range. *See, e.g., United States v. Medina-Carrasco*, 815 F.3d 457 (9th Cir. 2015). The waiver of appellate rights in *Medina-Carrasco*, however, specifically precluded a challenge to “any aspect of the defendant’s sentence – including the manner in which the sentence is determined and any sentencing guideline determinations.” *Id.* at 459. There is no such language in Doyle’s plea agreement.

Moreover, even assuming without conceding that Doyle’s waiver captures calculation of the Guidelines, the sentence imposed was illegal in the sense that the district court abdicated its bedrock procedural duty to correctly calculate the Guidelines. Doyle seeks to vindicate his constitutional right to due process and to be deprived of liberty only after proper calculation of his guideline sentencing range. Doyle’s claims are of constitutional dimension; they exist and survive outside of the

traditional Rule 11 appeal waiver analysis, as the Court suggested in *Class v. United States*, __ U.S. __, 138 S.Ct. 798 (2018).

Class v. United States, 138 S.Ct. 798 (2018), bolsters Doyle's claim. *Class* alters the appeal waiver landscape by identifying several categories of constitutional rights that are not extinguished by a guilty plea. These categories include claims that implicate the "very power of the State" to prosecute; claims that do not contradict the facts alleged in the charging document; claims that the admitted facts do not constitute a crime; and claims other than "case-related constitutional defects" that occur prior to entry of a guilty plea. *Id.* at 804-806. As noted by the dissent, *Class* suggests that a defendant may not be able to assert a claim that contradicts a plea agreement, "but whether this rule applies when the claim falls into one of the prior four categories is left unclear." *Id.* at 807, Alito, J., dissenting.

Class informs here because Doyle's appeal concerns constitutional defect – the abdication of the district court's procedural duty to correctly calculate the guideline range as the lodestar of the sentencing process – that occurred after the change of plea. Doyle did not and could not have known when he signed the plea agreement and later entered his guilty plea that the district court would miscalculate the Guidelines. *Class* instructs that Doyle's claims are not waived, even assuming the waiver encapsulates the calculation of the Guidelines. In a larger sense, *Class*

suggests that there are constitutional rights that exist outside of the traditional waiver analysis. Rights that are not waived by pleading guilty.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted.

Dated this 7th day of June, 2019.

/s/ Andrew Nelson
ANTHONY R. GALLAGHER
Federal Defender for the District of Montana
*ANDREW NELSON
Assistant Federal Defender
Federal Defenders of Montana
125 Bank St., Ste. 710
Missoula, Montana 59802-9380
(406) 721-6749
*Counsel of Record

APPENDIX A

United States v. Eric Daniel Doyle,
CA 18-30118, Dkt. 18, “Order Granting Motion to Dismiss”

APPENDIX B

U.S. Const. Amend. V

APPENDIX C

USSG Chapter 3, Part D
USSG Chapter 5, Part G