

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2019

RYAN DOUGLAS LASALLE,

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

*JOHN RHODES

Assistant Federal Defender

Federal Defenders of Montana

125 Bank St., Ste. 710

Missoula, Montana 59802-9380

(406) 721-6749

*Counsel of Record

SUBMITTED: February 11, 2020

QUESTION PRESENTED

Can a court of appeals successfully avoid undertaking plain error review of a Guidelines miscalculation by relying on a federal regulatory definition instead of the Congressional definition of an offense element analyzed under the *Taylor* categorical analysis and affirm because the novelty of the *Taylor* analysis precludes plain error?

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Ryan Douglas LaSalle (“Mr. LaSalle”) petitions for a Writ of Certiorari to grant certiorari and review his case or grant certiorari, vacate the judgment, and remand for reconsideration.

Mr. LaSalle asks this Court to consider the Ninth Circuit’s holding rejecting plain error because a regulatory definition supersedes a Congressional definition of

the element analyzed under the *Taylor* categorical approach and “[b]ecause [Petitioner’s] theory of this case involves a novel *Taylor* analysis, the district court did not commit plain error.” *United States v. LaSalle*, 785 Fed. Appx. 410, 412 (9th Cir. 2018).

JURISDICTION

The court of appeals issued its opinion denying Mr. LaSalle’s request for appellate relief on November 20, 2019. Appendix A. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States v. LaSalle*, 785 Fed. Appx. 410 (9th Cir. 2018). Appendix A.

LEGAL PROVISIONS INVOLVED

This case involves 18 U.S.C. § 3565, U.S.S.G. §§ 2K2.1, 4B1.2, 7B1.1, and 7B1.4. Appendices B-F.

STATEMENT OF THE CASE

On June 28, 2017, Mr. LaSalle was indicted and charged with felon in possession of firearm in violation of 18 U.S.C. § 922(g)(1), as well as a forfeiture count. On February 1, 2018, Mr. LaSalle filed a motion to plead guilty to the sole

charge and admit forfeiture in the indictment. He pled guilty without the benefit of a plea agreement. On February 20, 2018, Mr. LaSalle appeared before the magistrate judge and changed his plea to guilty. That same day, the magistrate filed his recommendation that the district court accept Mr. LaSalle's guilty plea. On March 12, 2018, the district court adopted the magistrate's findings and accepted Mr. LaSalle's guilty plea.

On June 7, 2018, Mr. LaSalle was sentenced to five years probation.

On August 15, 2018, a petition to revoke Mr. LaSalle's probation was filed. Mr. LaSalle was arrested and made his initial appearance in Missoula that same day.

On September 10, 2018, a final revocation hearing was held in Missoula. Mr. LaSalle's probation was revoked and he was sentenced to 36 months imprisonment, to be followed by 36 months of supervised release.

PRIOR PROCEEDINGS

On June 28, 2017, Mr. LaSalle was indicted and charged with felon in possession of firearm in violation of 18 U.S.C. § 922(g)(1), as well as a forfeiture count. Mr. LaSalle was in state custody at the time of his federal indictment. Mr. LaSalle was arraigned in Missoula on this indictment on December 7, 2017.

On February 1, 2018, Mr. LaSalle filed a motion to plead guilty to the sole charge and admit forfeiture in the indictment. He pled guilty without the benefit of

a plea agreement. On February 20, 2018, Mr. LaSalle appeared before the magistrate judge and changed his plea to guilty. That same day, the magistrate filed his recommendation that the district court accept Mr. LaSalle's guilty plea. On March 12, 2018, the district court adopted the magistrate's findings and accepted Mr. LaSalle's guilty plea. On June 7, 2018, Mr. LaSalle was sentenced to five years probation.

On August 15, 2018, a petition to revoke Mr. LaSalle's probation was filed. Mr. LaSalle was arrested and made his initial appearance in Missoula that same day.

On September 10, 2018, a final revocation hearing was held in Missoula. Mr. LaSalle's probation was revoked and he was sentenced to 36 months imprisonment, to be followed by 36 months of supervised release.

Mr. LaSalle appealed on September 21, 2018.

The Ninth Circuit Court of Appeals affirmed on November 20, 2019.

Appendix A.

FACTUAL BACKGROUND

Original Prosecution

Mr. LaSalle was arrested after trespassing on the property of the Knife River Corporation in Kalispell, Montana, on September 20, 2016. At the time, Mr. LaSalle was serving a State-of-Montana-imposed term of probation. Subsequent

investigation of the Knife River property revealed a handgun, stored with a suspected burglar's kit. In phone conversations to his girlfriend and his father from the Flathead County Detention Facility, Mr. LaSalle referenced possessing the handgun.

Mr. LaSalle was charged with, and convicted of, one count of felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The United States Probation Office prepared a Presentence Investigation Report (“PSR”). The PSR calculated the offense level. Relevant here, Mr. LaSalle’s base offense level was based on his 2010 Montana state conviction for criminal distribution of dangerous drugs, specifically cocaine. PSR ¶¶ 18, 36. Mr. LaSalle did not object to the PSR’s calculation of the Guidelines.

At the sentencing hearing on June 7, 2018, the court reviewed these calculations, to which Mr. LaSalle, through his attorney, did not object. Following his counsel’s argument, Mr. LaSalle allocuted and answered questions from the court. The government made its sentencing recommendation. The court imposed a sentence of five years probation.

Probation Revocation

On August 15, 2018, Mr. LaSalle was arrested pursuant to a petition to revoke probation. The petition alleged three violations of his conditions of probation.

At the final revocation hearing on September 10, 2018, the Court reviewed both the original Guidelines calculations and the Chapter 7 revocation guidelines. Through his attorney, Mr. LaSalle agreed with the court's recitation of the available punishments. His attorney did not object to the court's calculation of the original Guidelines.

Mr. LaSalle admitted to the violations. The court revoked Mr. LaSalle's probationary sentence. The defense attorney requested a sentence within the Chapter 7 guidelines.

The government made its sentencing recommendation. It deferred to the court as to imprisonment but recommended the longest possible term of supervised release.

The court considered the 18 U.S.C. § 3553(a) factors. The court announced its sentencing decision, and imposed a sentence of 36 months imprisonment followed by 36 months of supervised release. Mr. LaSalle appealed.

Appeal

On appeal, Mr. LaSalle argued that the federal definition and State of Montana definition of cocaine differed, and that Montana's definition was broader. Due to this overbreadth, under the *Taylor* categorical approach, Mr. LaSalle argued that a State of Montana conviction for distribution of cocaine was not a "controlled substance offense" as defined in U.S.S.G. § 4B1.2, as cross-referenced by § 2K2.1, which establishes the Guidelines' base offense level. Because he had no prior "controlled substance offense" convictions, the Guidelines sentencing range the district court relied upon in sentencing Mr. LaSalle was incorrect. The district court committed plain error by relying on an incorrect Guidelines sentencing range.

The Ninth Circuit affirmed in an unpublished disposition. The Ninth Circuit did not reach a conclusion as to whether or not a Montana conviction for distribution of cocaine is a categorical match for federal Guidelines purposes. Instead, the Ninth Circuit reasoned that a federal regulatory definition of cocaine, rather than the statutory definition, could be used to analyze the *Taylor* element and determined that because Mr. LaSalle's "theory of this case involves a novel *Taylor* [categorical] analysis, the district court did not commit plain error." *LaSalle*, 785 Fed. Appx. at 412 (citing *Taylor v. United States*, 495 U.S. 575 (1990)).

Mr. LaSalle requests that this Court grant certiorari to consider his issue or, in the alternative, grant certiorari, vacate, and remand to the Ninth Circuit Court of Appeals with instructions to perform the required analysis.

REASONS FOR GRANTING THE PETITION

A. The district court was required to correctly calculate the Guidelines before imposing sentence.

1. How the Guidelines for probation revocations are calculated

Sentencing for revocation of probation is governed by 18 U.S.C. § 3565 and by Chapter 7 of the United States Sentencing Guidelines. Section 3565 directs district courts to first consider the factors set forth in 18 U.S.C. § 3553(a) and either 1) continue the term of probation or 2) revoke the probation sentence and resentence the defendant pursuant to Title 18, Part II, Chapter 227, Subchapter A of the United States Code. Subchapter A is titled “General Provisions” and contains the statutes that control criminal sentencing, including 18 U.S.C. § 3553(a). The district court must consider the §3553(a) factors twice: once when deciding whether to revoke, and then when deciding the revocation punishment.

When determining the punishment, two Guidelines sentencing ranges must be considered by the sentencing court. One range is the sentencing range from Chapter 7 of the Guidelines. Violations of probation conditions, or supervised release

conditions, are classified into Grade A, B, or C. U.S.S.G. § 7B1.1. The grade of the violation is then weighed alongside the defendant's criminal history, as calculated by the sentencing court for their original criminal judgment, resulting in a recommended revocation imprisonment range. U.S.S.G. § 7B1.4.

Mr. LaSalle's violations were Grade C violations. His Criminal History Category was V. The Chapter 7 Guidelines thus calculated a sentence of 7-to-13 months imprisonment. Mr. LaSalle did not object to the Chapter 7 Guideline calculations.

The other, typically greater, sentencing range that must be considered is the Guidelines sentencing range applied at the original criminal sentencing. 18 U.S.C. § 3565(a). When a term of probation has been revoked, § 3565(b) directs the court to "resentence the defendant under subchapter A to a sentence that includes a term of imprisonment." *Id.* Subchapter A is titled "General Provisions" and houses the primary statutes governing sentencing.

Most importantly, and most relevant to Mr. LaSalle, subchapter A includes 18 U.S.C. § 3553(a):

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed –
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for
–
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –
 - (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

- (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
- (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement –

- (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
- (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (underlines added). Thus, the command in § 3565(b) requires the district court to consider these factors, including the original Guidelines range, when determining the revocation sentence to impose.

The Ninth Circuit Court of Appeals has, in turn, determined that the district court must “consider the sentencing range applicable when he was originally sentenced[.]” *United States v. Olabanji*, 268 F.3d 636, 638 (9th Cir. 2001). Here, the district court calculated that sentencing range as 46-to-57 months.

2. The Guidelines were calculated incorrectly

The PSR calculated a base offense level of 20 pursuant to U.S.S.G. § 2K2.1(a)(4)(A), which provides a level of 20 if “the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense.” U.S.S.G. § 2K2.1(a)(4)(A). “Controlled substance offense” is defined through cross-reference to U.S.S.G. § 4B1.2.

In Mr. LaSalle’s case, the predicate “controlled substance offense” was his 2010 Montana state felony conviction for Criminal Distribution of Dangerous Drugs, specifically cocaine. PSR ¶¶ 18, 36. Section 2K2.1 of the Guidelines provides:

(a) Base Offense Level (Apply the Greatest):

(4) 20, if –

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense;

U.S.S.G. § 2K2.1(a)(4)(A). Application Note 1 to 2K2.1 specifies:

“Controlled substance offense” has the meaning given that term in §4B1.2(b) and Application Note 1 of the Commentary to §4B1.2 (Definitions of terms Used in Section 4B1.1).

U.S.S.G. § 2K2.1, Application Note 1. The cross-reference at U.S.S.G. § 4B1.2(b) directs:

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.

Id.

As detailed *infra*, Mr. LaSalle’s Montana state conviction for Criminal Distribution of Dangerous Drugs falls outside the definition of “controlled substance offense” as described in U.S.S.G. § 2K2.1(a)(4)(A). The Montana state definition of cocaine is broader than the federal definition, and Montana state law punishes conduct outside the bounds of a federal “controlled substance offense.”

Between Mr. LaSalle’s original sentencing and his revocation sentencing, in *Lorenzo v. Sessions (Lorenzo I)*, 902 F.3d 930 (9th Cir. 2018), the Ninth Circuit held

that when a state law definition of a controlled substance is overbroad, the predicate state offense does not qualify as a federal controlled substance offense.¹

In *Lorenzo*, the controlled substance in question was methamphetamine, and the conflict was between the California state and the federal definition of methamphetamine. *Id.* at 933. In sum, California's definition of methamphetamine included isomers of methamphetamine which are not federal controlled substances; the Ninth Circuit reasoned that the California definition was therefore broader, and that criminal convictions referencing or relying on that definition could not be federal controlled substance offenses. *Id.* at 939.

Mr. LaSalle makes a similar argument. Instead of California's definition of methamphetamine, Mr. LaSalle's case involves Montana's definition of cocaine.

Cocaine is included in Montana's Schedule II of dangerous drugs. Mont. Code Ann. § 50-32-224(1)(d). That section specifies:

Substances, vegetable origin or chemical synthesis. Unless specifically excepted or listed in another schedule, any of the following substances, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, are included in this category:

¹ The opinion in *Lorenzo* was withdrawn and superseded by *Lorenzo v. Whitaker (Lorenzo II)*, 725 Fed. Appx. 482 (9th Cir. 2019). Under a different analysis, *Lorenzo II* maintained the holding of *Lorenzo I*.

(a) coca leaves and any salt, compound, derivative, or preparation of coca leaves, including cocaine and ecgonine and their salts, isomers, derivatives, and salts of isomers, and derivatives, and any salt, compound, derivative, or preparation of them that is chemically equivalent or identical with any of these substances, except that these substances do not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine;

Id. (emphasis added).

Federal law defines cocaine:

coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; cocaine, its salts, optical and geometric isomers, and salts of isomers; ecgonine, its derivatives, their salts, isomers, and salts of isomers; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph.

21 U.S.C. § 812 Schedule II (a)(4).

The federal definition includes cocaine and the salts, isomers, and salts of isomers of cocaine. The Montana state definition includes cocaine their salts, isomers, salts of isomers, and derivatives of cocaine. The Montana state definition, thus, includes substances – derivatives of cocaine – not contemplated by the federal definition. Because the Montana statute under which Mr. LaSalle was convicted is broader than the federal definition of a “controlled substance offense,” it was plain error for the district court to define it as such when calculating the Guidelines.

B. The Ninth Circuit failed to address the issue.

The United States Court of Appeals for the Ninth Circuit affirmed the district court in an unpublished opinion. Appendix A.

The court began by noting that, because Mr. LaSalle did not raise his Guidelines objection before the district court, the claim is reviewed for plain error. *Id.* at 411. The court then correctly described the *Taylor* categorical analysis it must undertake to review Mr. LaSalle’s claim. *Id.*

However, the court did not perform its promised analysis. Rather, it invoked a federal regulatory, and not the statutory, definition of cocaine and then ruled that Mr. LaSalle’s *Taylor* analysis was “novel,” and this novelty established “the district court did not commit plain error.” *Id.* at 412.

“Novelty” does not determine the absence of plain error. *See, e.g., United States v. Stinson*, 734 F.3d 180, 184 (3d Cir. 2013) (“[L]ack of precedent alone will not prevent us from finding plain error.”). And Mr. LaSalle’s argument is not novel — it was based on the Ninth Circuit’s decision in *Lorenzo*, which was later withdrawn. And it is a straight-forward application of the *Taylor* categorical analysis, establishing that Montana’s definition of cocaine is broader than the federal definition of cocaine.

Mr. LaSalle’s argument meets all prongs of plain error review. *See generally United States v. Olano*, 507 U.S. 725, 733-735 (1993) (describing prongs). The district court erred in calculating Mr. LaSalle’s Guidelines.

The error was clear; Montana’s definition of cocaine is broader than the federal definition. To circumvent this jurisprudential fact, the court of appeals invoked a federal regulatory definition of cocaine. *LaSalle*, 785 Fed. Appx. at 412. An Executive Branch regulation cannot supersede Congressional legislation. “Section 812 delegates no authority to change existing laws or regulations that is relevant here.” *United States v. Eddy*, 549 F.2d 108, 113 (9th Cir. 1976) (footnote omitted); *see generally Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (“The starting point for interpretation of a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.”) (citation omitted).

To avoid the Separation of Powers violation, the court of appeals, without citing authority, dismissed Mr. “LaSalle’s theory of this case [because it] involve[d] a novel *Taylor* analysis.” *LaSalle*, 785 Fed. Appx. at 412.

The error affected Mr. LaSalle’s substantial rights.

When a defendant is sentenced under an incorrect Guidelines range — whether or not the defendant’s ultimate sentence falls within the correct

range — the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error.

Molina-Martinez v. United States, 136 S.Ct. 1338, 1345 (2016)

The error requires relief. Mr. LaSalle was sentenced under an erroneous Guidelines range and is in prison because of it.

[A] miscalculation of the United States Sentencing Guidelines range, that has been determined to be plain and to affect a defendant's substantial rights . . . will in the ordinary case, as here, seriously affect the fairness, integrity, or public protection of judicial proceedings, and thus will warrant relief.

Rosales-Mireles v. United States, 138 S.Ct. 1897, 1903 (2018)

A regulation cannot override a statute. There is no novelty exception to the *Taylor* categorical approach.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be granted for consideration by this Court, or the petition should be granted and this matter vacated and remanded to the Ninth Circuit Court of Appeals for further proceedings.

Dated this 11th day of February, 2020.

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