THE LIMITED IMPACT OF CUSTIS ON CHALLENGES TO PRIOR CONVICTIONS

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The recent Supreme Court decision in Custis v. United States1 changes the legal landscape with respect to challenges to prior convictions used to enhance sentences under the Armed Career Criminal Act ("ACCA"). Before Custis, eight of the nine circuits to have considered the issue permitted defendants charged under the ACCA to challenge the constitutionality of their prior convictions at time of sentencing. The Custis opinion, written by Chief Justice Rehnquist, overruled these eight circuits, holding that an ACCA defendant cannot challenge the constitutionality of prior state court convictions at his federal sentencing, with the one exception of prior convictions in which the defendant did not have counsel.

Considering the lengthy sentences at stake under the ACCA, it would appear that the impact of Custis would be dramatic: it would seem to bar defense arguments that could reduce a sentence from, using Custis as an example, nearly twenty years to about three years. On close examination, however, it appears that Custis may have a much more limited impact. As Justice Ginsburg, who was in the majority in Custis, noted in her dissent in a separate case, "Custis presented a forum question. The issue was where, not whether, the defendant could attack a prior conviction for constitutional infirmity."2 While Custis does bar such challenges at sentencing, it allows challenges to prior state court convictions to be brought right after sentencing in the form of a federal habeas petition.

THE CUSTIS DECISION

In Custis, the defendant had attacked the validity of two of the three prior state court convictions that the government sought to use to enhance his sentence under the ACCA. The first was a conviction in 1985 for burglary based on a guilty plea. Custis claimed that his counsel was ineffective and that his plea was not knowing and voluntary. The second was a conviction in 1989 for attempted burglary based on a stipulated trial. Custis claimed that his counsel there was also ineffective and that the stipulated trial amounted to a guilty plea but without any waiver of rights.

The Supreme Court upheld the decisions of the lower courts denying Custis the opportunity to raise challenges to the prior convictions at sentencing. The Court held that the ACCA did not provide for a right to bring such challenges and that the Constitution required only that defendants be permitted at sentencing to attack prior convictions that were uncounseled. The Court also reasoned that concerns for ease of administration and finality of judgments supported the restriction on challenges to prior state court convictions.

Perhaps more important than the arguments advanced by the Court was the argument it deliberately eschewed. While noting that the appeals court had based its decision in part on concerns for comity and federalism, the Supreme Court did not adopt this argument as its own. It thus implicitly indicated that these concerns should not bar a federal court decision that a prior state court conviction could not be used to enhance a federal sentence because the conviction was invalid.

Having firmly shut the door on challenges to prior state convictions in the federal sentencing forum, the Court expressly left the door open for challenges in the state or federal habeas forum. The Court stated:

We recognize, however, . . . that Custis, who was still "in custody" for purposes of his state convictions at the time of his federal sentencing under section 924(e), may attack his state sentences in Maryland or through federal habeas review. See Maleng v. Cook, 490 U.S. 492 (1989). If Custis is successful in attacking these state sentences, he may then apply for reopening of any federal sentences enhanced by the state sentences.3

Justice Souter, in his dissent in Custis, makes the methods of attacking prior convictions more explicit. After noting the availability of state or federal habeas review for defendants still "in custody" on state sentences, Justice Souter goes on to note, "And the Court does not disturb the uniform appellate case law holding that an individual serving an enhanced sentence may invoke federal habeas to reduce the sentence to the extent it was lengthened by a prior unconstitutional conviction."4 Justice Souter cites Maleng and its progeny.

THE MALENG DECISION

In Maleng, the Supreme Court defined the "in custody" requirement for purposes of federal habeas corpus petitions. It ruled that a defendant is not "in custody" on a sentence when he is no longer under a term of imprisonment, parole or probation. The Court therefore barred the defendant from directly attacking his 1958 conviction since the sentence had fully expired. The Court allowed the defendant, however, to continue his habeas attack on his existing sentence for a 1978 conviction, even though the ultimate question the attack raised was the validity of the expired 1958 conviction that was used to enhance the existing sentence.5 The Courts of Appeals following Maleng have, as Justice Souter points out, uniformly interpreted the decision as allowing a
defendant, in a habeas attack on an existing sentence, to challenge the validity of expired convictions used to enhance the sentence.\textsuperscript{6}

FEDERAL HABEAS PETITIONS UNDER §2255

The reference in both the majority and dissenting opinions of Custis to the Maleng decision is important because most ACCA defendants will have fully served their sentences on their prior convictions by the time they face sentencing under the ACCA. Thus, most defendants will not be “in custody” on those prior convictions, and they probably will not be able to bring challenges under state habeas law. The only realistic alternative, aside from a state coram nobis petition, will be a federal habeas petition filed under 28 U.S.C. §2255. Such a petition, which can be filed with the sentencing court any time after sentencing, would challenge the federal sentence on the ground that it was improperly enhanced by prior convictions that were invalid. The §2255 habeas petition would thereby provide the defendant with a forum in which to argue the unconstitutionality of the prior convictions to the sentencing judge. If the defense were to prevail on any of these arguments, the defendant would be entitled under Custis to resentencing without considering the invalid prior convictions.\textsuperscript{7}

Thus, reading Custis together with Maleng, the very same challenges to prior convictions that were previously brought at the sentencing hearing may now be brought in the same court immediately after sentencing in the form of a federal habeas petition. As Justice Souter notes in his dissent, it is hard to see how merely shifting such challenges to a different forum is in the interests of judicial economy and “ease of administration.”\textsuperscript{8} Nonetheless, Custis is fundamentally a “forum” decision, and the habeas forum is left open.

CUSTIS AND GUIDELINES SENTENCING

One crucial question that Custis does not answer is whether it also bars challenges at sentencing to prior convictions in cases controlled by the federal sentencing guidelines. The Second and Eighth Circuits have already held that Custis does bar such challenges.\textsuperscript{9} The Ninth Circuit, on the other hand, has hinted that there may still be an independent basis for challenges in guidelines cases.\textsuperscript{10} Clearly, in light of Custis, the constitution cannot provide the basis for bringing a challenge at time of sentencing. Several circuits, however, held prior to Custis that the guidelines in effect before November 1993 contained commentary that gave district courts discretion over whether to allow challenges at sentencing.\textsuperscript{11} Custis does not overrule these decisions since they were based on the guidelines and not the constitution. Thus it could be argued in cases controlled by the old guidelines that the defendant still has a right to bring challenges at time of sentencing. In November 1993, however, the commentary was amended to state that the guidelines and commentary “do not confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law.”\textsuperscript{12} In cases controlled by the post-1993 guidelines, then, the commentary does not appear to provide an independent basis for bringing challenges at sentencing.

THE ADVANTAGES OF GIVING DISTRICT COURTS DISCRETION OVER WHEN TO HEAR CHALLENGES

A strong argument can be made for amending the guidelines so they are consistent with circuit decisions holding that district courts, while not required to hear challenges at time of sentencing, still have the discretion to do so.\textsuperscript{13} Under Custis, courts will be required to hear challenges to prior convictions in the form of §2255 petitions filed right after sentencing. If some courts, in the interests of “ease of administration,” would rather hear the less fact-intensive challenges at the sentencing hearing, why not permit them to do so? In many cases, the challenges can be decided quickly on the basis of notes of testimony from a piecemeal hearing. The habeas route, in such cases, would be more cumbersome and time consuming not only for the parties, but also for the court.

The importance of allowing courts the discretion to hear challenges at sentencing is especially clear in cases in which prior convictions enhance the sentence under both mandatory drug laws (21 U.S.C. §841, et seq.) and the guidelines. In those cases, 21 U.S.C. §851 requires the defendant to raise any challenges before sentence is imposed. It would be the height of absurdity, not to mention a waste of judicial resources, to compel defendants to challenge prior convictions before sentencing for purposes of section 851, but then have them wait until after sentencing to raise the same challenges for guidelines purposes. Defendants should be able to raise their challenges in a single proceeding prior to imposition of sentence. Concerns for judicial economy strongly support a guideline amendment to give district courts greater control over when to hear challenges to prior convictions in guidelines cases.

CONCLUSION

Custis does not sound the death knell for challenges to prior convictions. As a decision only about “where,” and not whether, a defendant can bring a challenge, it shifts the forum for challenges from the sentencing court to the habeas court. The six justice majority in Custis clearly intended that all defendants have at least one avenue open for attempting to show that the prior convictions used to enhance their sentences were constitutionally infirm.

FOOTNOTES

\textsuperscript{1} 511 U.S. \textemdash \textsuperscript{1} 114 S.Ct. 1732 (1994).
sentiment, and political courage is in short supply in the White House and on Capitol Hill. For a decade now, crime legislation has been a case study of American government at its very worst: ignorant, unprincipled and unable to learn from previous mistakes. The dangerously unnecessary push for three-strikes legislation is only the latest of many disappointments to those who hope for a rational criminal justice policy.

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and populist sentiments toward crime and criminals have been expressed in legislation without any restraining influence. At the federal level, the primary monument to panic legislation is a massively expensive and wasteful war on drugs that resulted from citizen fears and exacerbated those fears.

Now violence is the focus of public fear, and three strikes is the pseudo-solution of the day. It takes political courage to oppose a wave of populist