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CASE SUMMARY

UNITED STATES V. FIDEL CASTRO-VERDUGO: UNLAWFULLY SENTENCED DEFENDANT IS PROCEDURALLY BARRED FROM RELIEF

*E. ROSE LONDON**

INTRODUCTION

In *United States v. Fidel Castro-Verdugo*,¹ the Ninth Circuit held that the court lacks the jurisdiction to correct an underlying unlawful sentence imposed by the district court in the context of a probation revocation appeal.² Despite clear error on the part of the sentencing judge, Defendant-Appellant (Defendant) did not timely file a petition for a writ of habeas corpus;³ therefore, no remedy was available to him.⁴

The dissenting opinion asserted that the court did have jurisdiction to correct the error because Defendant appealed from a later sentence erroneously based on the underlying unlawful sentence.⁵ Noting that it is the role of appellate courts to correct errors made by lower courts, the dissent disagreed strongly with the majority's decision to uphold a known error.⁶

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¹ *United States v. Fidel Castro-Verdugo*, 750 F.3d 1065 (9th Cir. 2014) (majority opinion by Graber, J.; with fellow panelists Kozinski, C.J., and Breyer, J., Sr. U.S. District Judge, N.D. Cal., sitting by designation).

² *Castro-Verdugo*, 750 F.3d at 1068.

³ 28 U.S.C. § 2255 (2015).

⁴ *Id.* at 1070-71.

⁵ *Id.* at 1073 (Breyer, J., dissenting).

⁶ *Id.* at 1072, 73 (dissent).

I. FACTS

Defendant Fidel Castro-Verdugo is a Mexican citizen.⁷ He was charged with, and pled guilty to, illegal reentry⁸ in 2011 and Federal Judge Larry J. Burns of the Southern District of California sentenced him to six months imprisonment and a five-year term of probation.⁹ Per statute¹⁰ and precedent,¹¹ it is improper to sentence a defendant to imprisonment and probation for the same offense.¹²

As a condition of his plea agreement, Defendant waived his right to appeal or collaterally attack the district court's judgment.¹³ Though Defendant was represented by counsel, his attorney failed to move, vacate, amend, or correct the sentence, and the court removed Defendant to Mexico after staying his custodial sentence.¹⁴ Conditions of his probation included a requirement forbidding him to return to the United States illegally.¹⁵

In 2013, after having illegally reentered the United States,¹⁶ Defendant appeared again before the Southern District. He pled guilty to the same offense that he had two years prior: violating 8 U.S.C. § 1326, illegal reentry.¹⁷ The district court sentenced Defendant to six months custodial time and three years of supervised release¹⁸ for the 2013 reen-

⁷ *Id.* at 1067.

⁸ In violation of 8 U.S.C. § 26 (“[A]ny alien who has been . . . deported or removed . . . and thereafter [unlawfully] reenters the United States] . . . shall be fined under Title 18 or imprisoned not more than two years.”).

⁹ *Castro-Verdugo*, 750 F.3d at 1067.

¹⁰ 18 U.S.C. § 3561(a)(3) (2015) (“(A) A defendant who has been found guilty of an offense may be sentenced to a term of probation unless (3) the defendant is sentenced at the same time to a term of imprisonment for the same or a different offense that is not a petty offense.”).

¹¹ *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999) (“Holding that straight prison time and probation are mutually exclusive by statute, we vacate the sentence and remand.”).

¹² *Castro-Verdugo*, 750 F.3d at 1067 (“At sentencing, the district court imposed a period of probation along with a stayed custodial sentence, thereby exceeding the court’s authority under 18 U.S.C. § 3561(a)(3).”).

¹³ Except for an attack based on a claim of ineffective assistance of counsel. *See United States v. Fidel Castro-Verdugo*, 750 F.3d 1065, 1067 (9th Cir. 2014).

¹⁴ *Id.*

¹⁵ *Id.* The court also noted that Defendant had no criminal record, but had been removed from the United States about 30 times and each time had been told not to illegally reenter. *Id.*

¹⁶ *Id.* at 1067-68.

¹⁷ *Castro-Verdugo*, 750 F.3d. at 1067.

¹⁸ Supervised release is distinguished from probation in that legally speaking probation is intended to be a substitute for custodial time whereas supervised release replaced federal parole in 1987 and is intended to accompany custodial time. *See Frequently Asked Questions For Probation and Pretrial*, U.S. PROBATION AND PRETRIAL OFFICE, http://www.mow.uscourts.gov/probation_pretrial/probation_faq.html (last visited October 16, 2015).

try.¹⁹ Once again, he waived his right to appeal or collaterally attack the sentence, except claims based on ineffective assistance of counsel.²⁰

Following a petition to the district court from the United States Probation Office seeking a warrant to revoke Defendant's 2011 probation,²¹ a revocation hearing took place. At the hearing, Defendant argued that because his 2011 sentence was improper,²² the district court lacked jurisdiction to revoke his probation. The district court disagreed, finding that it did have jurisdiction to do so, and sentenced Defendant to a prison term of six months and one day, to run consecutively with his custodial time for the 2013 conviction. He also received one year of supervised release, which would run concurrently²³ with the supervised release for the 2013 conviction.²⁴

This Case Summary discusses Defendant Castro-Verdugo's timely appeal of that decision, and the Ninth Circuit reviewed *de novo* the 2013 district court's assumption of jurisdiction.²⁵ The Ninth Circuit found that proper jurisdiction existed, and the court reviewed the district court's sentence for abuse of discretion.²⁶

II. COURT'S ANALYSIS

A. WHETHER THE DISTRICT COURT HAD JURISDICTION TO REVOKE DEFENDANT'S PROBATION

The court reviewed the jurisdictional limits of the 2013 sentencing court in response to Defendant's assertion that the district court exceeded its jurisdictional authority by revoking his unlawfully levied probation.²⁷ As the court noted, the 2011 sentence was undisputedly unlawful.²⁸ At no point in the opinion or dissent was there any question as to whether the 2011 sentencing judge was in direct violation of 18 U.S.C. § 3561(a)(3) when he sentenced Defendant to custodial time and proba-

¹⁹ *Castro-Verdugo*, 750 F.3d at 1067.

²⁰ *Id.*

²¹ *Id.* at 1068.

²² Defendant cited *United States v. Forbes*, 172 F.3d 675, 676 (9th Cir. 1999) (finding that custodial time and probation are "mutually exclusive by statute.").

²³ Concurrent sentences may be served simultaneously, whereas consecutive sentences are served back-to-back with no period of release in between. See Jane Portman, *Current and Consecutive Sentences, and Double Punishment*, NOLO LAW FOR ALL, <http://www.nolo.com/legal-encyclopedia/concurrent-consecutive-sentences-double-punishment.html> (last visited October 16, 2015).

²⁴ *Castro-Verdugo*, 750 F.3d at 1068.

²⁵ *United States v. Fidel Castro-Verdugo*, 750 F.3d 1065, 1067 (9th Cir. 2014).

²⁶ *Id.*

²⁷ See *id.* at 1068.

²⁸ *Id.*

tion simultaneously for the same offense; instead, the court took it as fact.²⁹

The heart of the initial analysis centered on the difference between a court exceeding jurisdictional limits and exceeding statutory limits. Jurisdictional authority concerns whether the court is authorized by the Constitution or by statute to hear the case at bar.³⁰ An overreach with respect to jurisdictional limits has entirely different grounds for relief than an overreach in terms of statutory authority.³¹ Unlike a court that has exceeded jurisdictional limits, a court exceeding statutory sentencing authority does not provide one of the appellate grounds for relief enumerated by statute.³² Although unlawful sentencing is by no means overlooked, jurisdiction is more heavily protected as a cornerstone of constitutionally proper court proceedings.

The Ninth Circuit determined that the 2011 district court exceeded its statutory authority, not its jurisdictional authority.³³ When the 2011 court sentenced Defendant to probation and custodial time for the same offense it violated 18 U.S.C. § 3561(a)(3). However, as the court that imposed the probation, it did have jurisdiction to hear the probation revocation proceeding in 2013.³⁴ Therefore, Defendant's jurisdiction argument was without merit.³⁵

B. WHETHER THE NINTH CIRCUIT CAN RETROACTIVELY CORRECT DEFENDANT'S 2011 UNLAWFUL SENTENCE

Having dispatched with the jurisdictional issue in a few paragraphs,³⁶ the court then clarified why it was unable to correct the underlying unlawful sentence.³⁷ The crux of the issue was that the nature of the hearing precluded the court from addressing the unlawful 2011

²⁹ *Id.* at 1067 (describing the sentence as “exceeding the court’s authority under [statute]” and “clearly erroneous”).

³⁰ *United States v. Cotton*, 535 U.S. 625, 630 (2002) (finding that jurisdiction is “the court’s statutory or constitutional power to adjudicate the case.”).

³¹ *Castro-Verdugo*, 750 F.3d at 1068.

³² *See* 28 U.S.C. § 2255; *see also* *Hitchcock v. United States*, 580 F.2d 964, 965 (9th Cir. 1978).

³³ *Castro-Verdugo*, 750 F.3d at 1068.

³⁴ *Id.* at 1069 (“[T]he *only* criteria necessary to create jurisdiction over probation revocation proceedings are (1) that the defendant still be serving a term of probation and (2) that the defendant violate its conditions.”) (emphasis in original).

³⁵ *Id.*

³⁶ Cases raised by Defendant were found not to be analogous: *United States v. Schmidt*, 99 F.3d 315 (9th Cir. 1996), focused on the length of time a district court retains jurisdiction to carry out probation and parole hearings, and in *United States v. Vargas-Amaya*, 389 F.3d 901 (9th Cir. 2004) the court found that the district court lacked jurisdiction because it failed to issue the proper summons in a timely manner. Neither of these issues were before the court in this case.

³⁷ *See* *United States v. Fidel Castro-Verdugo*, 750 F.3d 1065, 1069-71 (9th Cir. 2014).

sentence. The court asserted that in the context of a probation revocation hearing, its hands were tied even in the face of clear error.³⁸ Quoting controlling precedent,³⁹ the court noted that “[a]n appeal challenging a probation revocation proceeding is not the proper avenue through which to attack the validity of the original sentence.”⁴⁰

Instead, Defendant should have immediately challenged the validity of the sentence using habeas law,⁴¹ particularly 28 U.S.C. § 2255.⁴² This was not only the proper avenue to seek relief, it was the only avenue available to Defendant.⁴³ However, due to the statute of limitations⁴⁴ imposed on habeas petitions by 28 U.S.C. § 2255,⁴⁵ this remedy (which the court noted “could have corrected the sentence”) was no longer available to Defendant.⁴⁶

The court explained, “[h]owever much we agree that the 2011 sentence was imposed in error and that Defendant’s 2011 counsel should have moved to correct it promptly, Defendant in fact was still serving a term of probation in 2013.”⁴⁷ The finding that Defendant was still on probation (albeit unlawfully imposed probation) assured the 2013 court’s jurisdiction, and Defendant’s argument was defeated.⁴⁸ Reinforcing the message, the court went on to note that “[The Ninth Circuit does] not have a freestanding mandate to fix every mistake that we see” and “lack[s] jurisdiction over any appeal, no matter how strong the merits, that is untimely filed.”⁴⁹ The court made it clear that it was legally pre-

³⁸ *Castro-Verdugo*, 750 F.3d at 1091.

³⁹ *United States v. Gerace*, 997 F.2d 1293 (9th Cir. 1993), cited frequently by the court along with *United States v. Simmons*, 812 F.2d 561 (9th Cir. 1987), both of which stand for the proposition that the Ninth Circuit Court “cannot reopen the underlying proceedings at which probation was originally imposed when the subject before [the court] is probation revocation.” *Castro-Verdugo* at n.1.

⁴⁰ *Id.* at 1295.

⁴¹ From the Latin “you have the body” or “produce the body,” a petition for a Writ of Habeas Corpus is the proper legal mechanism to challenge the unlawful holding of a person by the government. BLACK’S LAW DICTIONARY 728 (8th ed. 2007).

⁴² 28 U.S.C. § 2255 (2015) Federal custody, remedies on motion attacking sentence.

⁴³ *Castro-Verdugo*, 750 F.3d at 1069 (finding that attacking the validity of the original sentence “*must* be done in a § 2255 petition”) (emphasis added).

⁴⁴ Per 28 U.S.C. § 2255, a petitioner has one year “from the date on which the conviction becomes final” to bring a motion under that statute.

⁴⁵ See the Anti-terrorism and Effective Death Penalty Act of 1996, codified as 28 U.S.C. §§ 2244, 2245, 2255 (2015).

⁴⁶ *Castro-Verdugo*, 750 F.3d at 1071.

⁴⁷ *Id.*

⁴⁸ *United States v. Fidel Castro-Verdugo*, 750 F.3d 1065, 1071 (9th Cir. 2014).

⁴⁹ *Id.*

cluded from correcting the 2011 court's unlawful imposition of probation or the resulting probation violation.⁵⁰

C. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN IMPOSING A TERM OF SUPERVISED RELEASE

The court raised and swiftly dismissed Defendant's challenge of the imposition of supervised release by the 2013 district court. In accordance with the sentencing guidelines,⁵¹ which were demonstrably considered and reasonably applied by the 2013 district court,⁵² a term of supervised release was deemed an appropriate sentence. The Ninth Circuit noted that the district court considered positive information about Defendant, such as his lack of criminal history,⁵³ as well as his repeated unlawful entries into the country.⁵⁴ The court found that "[t]he district court committed no procedural error."⁵⁵ After noting briefly that case law supported imposing supervised release on a person due to be removed from the country after their custodial time,⁵⁶ the court concluded the analysis, finding that the sentence of supervised release was neither procedural error nor substantively unreasonable.⁵⁷

III. DISSENT

Judge Breyer disagreed with the other two panel members about a number of aspects of the case, particularly whether the Ninth Circuit had the authority to correct the unlawful sentence,⁵⁸ and the unrealistic remedies proposed by the majority.⁵⁹ The first paragraph of the dissent concluded "I cannot concur in an opinion that upholds clear error, and therefore respectfully dissent."⁶⁰

The dissent took strong issue with the refusal of the majority to act.⁶¹ Although Judge Breyer agreed with the majority that the 2013

⁵⁰ *Id.* at n.4. The court declined to opine as to whether equitable tolling might apply to an ineffective assistance of counsel claim.

⁵¹ United States Sentencing Guidelines § 5D1.1 allowed the court to consider factors such as Defendant's history of reentry and promise to the 2011 court that he would not return unlawfully.

⁵² *Castro-Verdugo*, 750 F.3d at 1072 ("The record reflects that the district court considered Defendant's arguments and evidence.").

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *See, e.g.,* United States v. Valdavinosa-Torres, 704 F.3d 679, 692-93 (9th Cir. 2012).

⁵⁷ *See Castro-Verdugo*, 750 F.3d at 1072.

⁵⁸ *Id.* at 1073 (Breyer, J. dissenting).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1072 (Breyer J.,dissenting).

⁶¹ *See generally*, United States v. Fidel Castro-Verdugo, 750 F.3d 1065, 1072-76 (9th Cir.

court had jurisdiction,⁶² he argued that the jurisdictional argument “misses the point.”⁶³ The district court, he argued, exceeded its authority twice: first, by imposing the “illegal term of probation” in 2011 and second, by upholding the probation when sentencing Defendant in 2013.⁶⁴ The majority’s finding that the 2013 court had jurisdiction did nothing to correct the underlying error.⁶⁵ Judge Breyer argued that this is indeed the role of the appellate court: “Plain error is for a reviewing court to correct, but apparently not here.”⁶⁶

The dissent based its arguments on the premise that the majority relied on two inapposite cases, then offered the “wrongfully sentenced defendant” two options, neither of which “make sense.”⁶⁷ The two cases relied upon heavily by the majority, *United States v. Gerace*⁶⁸ and *United States v. Simmons*,⁶⁹ involved collateral attacks on underlying convictions, not underlying sentences,⁷⁰ and neither involved a claim of lack of statutory authority, the primary underlying issue in *Castro-Verdugo*. Though the *Gerace* quotation cited by the majority⁷¹ is accurate, the court in *Gerace* relied entirely on *Simmons* in making that assertion,⁷² and the quote from *Simmons* uses the word “conviction” where *Gerace* used “sentence.”⁷³

The majority suggested two remedies that would have been available to Defendant in 2011: bringing a timely petition under 28 U.S.C. § 2255; or having defense counsel move to vacate, amend, or correct the sentence.⁷⁴ The dissent argued that offering these remedies, which were no longer available to Defendant, did not satisfy the duty of the court. Judge Breyer gave the following reasons as to why these remedies were of no use: futility, timeliness, and mootness.⁷⁵ The argument for futility was based on a quote from Judge Burns, the sentencing judge, who said on the record that he still thought that the sentence he imposed was lawful.⁷⁶

2014) (Breyer, J., dissenting).

⁶² *Id.* at 1073 (Breyer, J., dissenting).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *United States v. Gerace*, 997 F.2d 1293 (9th Cir. 1993).

⁶⁹ *United States v. Simmons*, 812 F.2d 561 (9th Cir. 1987).

⁷⁰ Emphasis added.

⁷¹ *Gerace*, 997 F.2d at 1295 (“[a]n appeal challenging a probation revocation proceeding is not the proper avenue through which to attack the validity of the underlying sentence”).

⁷² *Gerace*, 997 F.2d at 1295 (citing *Simmons*, 812 F.2d at 563).

⁷³ *Simmons*, 812 F.2d at 563.

⁷⁴ *Castro-Verdugo*, 750 F.3d at 1067-68.

⁷⁵ *Castro-Verdugo*, 750 F.3d at 1075 (J. Breyer, dissenting).

⁷⁶ *Id.*

In addition, when the Southern District upheld Defendant's probation sentence in the 2013 proceedings (from which Defendant brought this appeal), it made clear that the court still operated on the belief that the probation was valid. The argument for timeliness is based on the fact that Defendant was held for mere days before being removed, nowhere near enough time to file a habeas petition.⁷⁷ His options were to be removed from the United States or to remain in custody through the weeks or months that a habeas petition would take.⁷⁸ Additionally, by the time of the 2013 hearing, the one year statute of limitations⁷⁹ for habeas petitions had long since run out, and the fourteen days⁸⁰ that Defendant was allowed by statute to challenge the conviction expired far sooner. Finally, once Defendant was removed to Mexico, any petition would be moot because there would no longer be a "live and active controversy"⁸¹ as required to preclude mootness.⁸²

Concluding, the dissent provided statutory support for its assertion that the Ninth Circuit did have the authority to correct the sentence. Per 28 U.S.C. § 1291, "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts." Per case law, an order revoking probation is a "final decision" and subject to appellate review.⁸³ Therefore, the Ninth Circuit "has jurisdiction and with jurisdiction comes a source of authority to correct the clear error in this case."

CONCLUSION

The Ninth Circuit in *Castro-Verdugo* addressed the issue of excessive sentencing and how defendants must go about challenging an excessive or otherwise unlawful sentence. Although the court was unable to provide relief for Defendant, it clarified the limited scope of probation revocation hearings and provided a "roadmap" for bringing a proper and timely challenge under 28 U.S.C. § 2255, which will likely be useful to future defendants. Additionally, the thoughtful and thorough dissent may help future courts provide the relief sought by and denied to Defendant Fidel Castro-Verdugo.

⁷⁷ *Castro-Verdugo*, 750 F.3d at 1075 (J. Breyer, dissenting).

⁷⁸ *Id.*

⁷⁹ 28 U.S.C. § 2255 (2015).

⁸⁰ Fed. R. Crim. P. 35(a).

⁸¹ Black's Law Dictionary 1029 (8th ed. 2007) (defining "moot case" as "A matter in which a controversy no longer exists; a case that raises only an abstract question that does not rise from existing facts or rights.")

⁸² *Castro-Verdugo*, 750 F.3d at 1076 (J. Breyer, dissenting).

⁸³ *See, e.g., United States v. Vasquez*, 160 F.3d 1237 (9th Cir. 1988) (reviewing the imposition of punishment upon a revocation of probation pursuant to 28 U.S.C. § 1291).