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Federal Criminal Procedure - Habeas Corpus Procedures - Discretion to Deny Successive Habeas Corpus Applications Without a Hearing - Hilbrich v. United States, 406 F.2d 850 (7th Cir. 1969)

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remedy an unfair labor practice which is in violation of the Act.[18] However, it has at times declined to exercise its jurisdiction to deal with unfair labor practices where federal labor policy would best be served by leaving the parties to other processes of law [19]

The holding of the Supreme Court in *NLRB v. Strong*[20] has served to modify the authority of the Board by enlarging the base from which "affirmative action" as provided in Section 160(c) to effectuate the policies of the Act may be taken.[21] Although specific reference is made therein only to remuneration for prior services, the fact that fringe benefits do not constitute direct compensation was not considered fatal to the issue.[22] Such benefits are receivable in addition to direct compensation, and an unfair labor practice may cause pecuniary loss to an employee in both areas. Thus, once an employer's action is determined to be an unfair labor practice, the Board may now take remedial action by ordering payment of lost fringe benefits, considered now to constitute "back pay" [23]

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Federal Criminal Procedure—HABEAS CORPUS PROCEDURES—DISCRETION TO DENY SUCCESSIVE HABEAS CORPUS APPLICATIONS WITHOUT A HEARING. *Hilbrich v. United States*, 406 F.2d 850 (7th Cir. 1969)

In 1963 petitioner was convicted of bank robbery His appeal, based on the contention that he was not brought before the United States Commissioner with the requisite dispatch, and that his confession

18. Smith v. Evening News Assn., 371 U.S. 195, 197-98 (1962). It should be noted that Congress established the judicial remedy of 29 U.S.C. § 185 (1964), in lieu of a proposal to make breach of a collective bargaining agreement itself an unfair labor practice. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957). *See* Mendelsohn, *Enforceability of Arbitration Agreements Under Taft-Hartley Section* 301, 66 YALE L.J. 167 (1956).

19. In Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), the Board recognized the arbitrator's award in an attempt to encourage voluntary settlement of labor disputes. In Consolidated Aircraft Corp, 47 N.L.R.B. 694 (1943), the Board refused to exercise jurisdiction where the parties had not exhausted their rights and remedies under the contract.

20. 393 U.S. 357 (1969).

21. In a recent case, the court alluded to NLRB v. Strong, 393 U.S. 357 (1969), to affirm the authority of the Board to determine back pay due wronged employees. NLRB v. K & H Specialties Co., Inc., 407 F.2d 820 (6th Cir. 1969).

22. 393 U.S. at — n.4.

23. *See* 29 U.S.C. § 160(c) (1964).

should not have been admitted, was denied.[1] He then moved under 28 U.S.C. § 2255[2] that his sentence be vacated and set aside on the ground that he had been promised punishment similar to that received by a codefendant. His motion was denied without a hearing, and the Court of Appeals for the Seventh Circuit affirmed.[3] Petitioner again moved under § 2255 to vacate and set aside his sentence, this time on the ground that his confession should have been excluded because it was coerced by threats of having his father and brothers arrested.[4] The federal district court denied the petition without a hearing, and petitioner appealed. The United States Court of Appeals for the Seventh Circuit reversed and remanded,[5] holding that the guidelines laid down by the Supreme Court in *Sanders v. United States*[6] required that the petitioner be afforded a hearing.

In establishing guidelines for federal courts to follow in determining whether habeas corpus applicants are entitled to a plenary hearing, the

1. Hilbrich v. United States, 341 F.2d 555, 558 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965).

2. 28 U.S.C. § 2255 (1964) provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

3. Hilbrich v. United States, 371 F.2d 826 (7th Cir. 1967).

4. Petitioner also requested relief on the ground that his confession was inadmissable under the doctrine of Miranda v. Arizona, 384 U.S. 436 (1966). This would have required a retroactive application of *Miranda*, and the court refused to consider it.

5. Hilbrich v. United States, 406 F.2d 850 (7th Cir. 1969).

6. 373 U.S. 1 (1963)

Supreme Court's "trilogy" of 1963[7] expanded the scope of available post-conviction remedies for both state and federal prisoners.[8] *Townsend v. Sain* held that a federal court must grant a full evidentiary hearing on the habeas corpus application of a state prisoner.

> [I]f (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[9]

Fay v. Noia held that the principles of res judicata and finality had no application to habeas corpus proceedings.[10]

Sanders v. United States set down guidelines for the use of the federal courts in determining if a prisoner is entitled to a plenary hearing on a second or successive application for a writ of habeas corpus.[11] The Supreme Court held that such a hearing must be granted unless the following conditions exist: " . (1) the same ground presented in the

7. *Id.*, Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 391 (1963).

8. *See* Note, *Federal Habeas Corpus*, 5 WM. & MARY L. REV. 150 (1964), for an analysis of the "trilogy" and a suggestion that it constitutes a new doctrine of federal habeas corpus.

9. 372 U.S. at 313.

10. 372 U.S. at 421. Motions under § 2255 are included in the generic term "habeas corpus proceeding." The Supreme Court has held that § 2255 applicants must be afforded relief at least as comprehensive in scope as that afforded to traditional habeas applicants in order to meet constitutional requirements. United States v. Hayman, 342 U.S. 205 (1952). *Hayman* also contains a complete discussion of the history of § 2255. The only significant difference between motions under § 2255 and traditional habeas corpus applications since Hayman is that the former must be addressed to the sentencing court, while the latter must be addressed to the federal district court for the district in which the prisoner is incarcerated. *See* Longsdorf, *The Federal Habeas Corpus Acts, Original and Amended*, 13 F.R.D. 407 (1953).

11. 373 U.S. 1. *Sanders* actually arose on the denial of a § 2255 motion, but the Supreme Court made it clear that *Sanders* and *Townsend* are mutually applicable, that is, that both sets of guidelines are to be applied to all applications, whether arising on traditional habeas corpus petitions or on § 2255 motions. The *Sanders* Court observed: "Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes." *Id.* at 15. Referring to *Townsend* and *Fay* the Court observed: "The principles developed in those decisions govern equally here." *Id.* at 18.

subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application." [12] The only other situation in which a hearing may be denied is when the prisoner has abused the remedy, and this must be pleaded by the government.[13]

Since the "trilogy," [14] nine of the eleven[15] Circuit Courts of Appeal have invoked the authority of *Sanders* in passing upon the actions of federal district courts in denying, without a hearing, a second or successive habeas corpus petition. There is no marked difference to be noted among the circuits in the manner in which the *Sanders* doctrine has been applied to various situations presented on appeal. Of course, an exercise of sound judicial discretion is inherent in the application of *Sanders*, particularly in deciding that the ends of justice would not be served by reaching the merits of the subsequent petition. Furthermore in this area results differ according to judicial philosophy and temperament. It is on this basis that the decisions reflect a somewhat greater willingness on the part of the Fifth Circuit[16] to find that the "ends of justice" will be served if a hearing is held, and some reluctance on the

12. *Id.* at 15.

13. Price v. Johnston, 334 U.S. 266 (1948). It should be noted, however, that the *Price* court also said that once the government has pleaded the abuse of remedy, the burden falls on the prisoner to prove otherwise. *Id.* at 292 (dictum). It would seem to follow that if the government pleads abuse of remedy, the prisoner must be afforded a hearing on at least that limited question.

14. Some authorities argue that the mandate of the "trilogy" is that at some point each convict should get at least one full evidentiary hearing on the merits of every federal right asserted. *See* Meador, *Accommodating State Criminal Procedure and Federal Postconviction Review*, 50 A.B.A.J. 928 (1964). This article was commented upon favorably by the Supreme Court in Henry v. Mississippi, 379 U.S. 443, 453 (1965). *See also* Becker, *Collateral Post-Conviction Review of State and Federal Criminal Judgements on Habeas Corpus and on Section 2255 Motions—View of a District Judge.* 33 F.R.D. 452 (1963). *Cf.* Jones v. Montana, 232 F Supp. 771 (D. Mont. 1964).

15. There were no decisions from the first or fourth circuits analytically applying the *Sanders* guidelines as of June 1, 1969.

16. "The rules formulated in *Sanders* make it clear that the District Court erred in summarily denying the present application without a hearing."

> The applicant was entitled at least to an opportunity to meet his burden to show that, although the ground was determined against him on the merits of his prior application, the ends of justice would be served by a redetermination of the ground. *Id.* at 696..

Goins v. Allgood, 391 F.2d 692, 695 (5th Cir. 1968) (dictum).

part of the Second and Ninth Circuits[17] to follow this reasoning. The other circuits seem to fall somewhere between the two.[18] Nevertheless, it is clear that *Sanders* represents the law with regard to the necessity for a plenary hearing on the second or successive application for federal habeas corpus relief, and that it is being applied with uniformity throughout the circuits.

In the present case, the Seventh Circuit for the first time applied the guidelines created in *Sanders* to reverse the district court's denial of a hearing to an applicant under section 2255. It did so in a manner consistent with the previous decisions of other circuits, while adding a refinement to *Sanders* that may prove to be of significance.

In his first appeal, petitioner had urged that his confession should have been excluded because of the delay in being brought before the United States Commissioner. This issue was decided against the accused on the merits. In the present case he again claimed that his confession should have been excluded, but asserted different facts to support his claim: that the confession was coerced by threats of having members of his family arrested. The court had to decide whether petitioner was asserting a claim previously determined against him on the merits. This, in turn, depended on the interpretation the court gave to the word "ground" in the first *Sanders* guideline.

If petitioner's claim that his confession was erroneously admitted is deemed to be the "ground," he would not be entitled to a hearing, that issue having been previously decided against him on the merits. If, on the other hand, the facts in support of each claim were found to constitute the "ground" referred to in *Sanders*, petitioner would be entitled to a hearing, having asserted a completely new ground.

The *Sanders* Court had observed: "By 'ground,' we mean simply a sufficient legal basis for granting the relief sought by the applicant." [19] It also said: "Should doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." [20] In this case, the Court held that the facts alleged by petitioner constituted the "ground" referred to in *Sanders*, that it had

17. Schnitzler v. Follette, 406 F.2d 319 (2d Cir. 1969); Dixon v. Rhay, 396 F.2d 760 (9th Cir. 1968); Smith v. Wilson, 371 F.2d 681 (9th Cir. 1967).

18. Thomas v. United States, 352 F.2d 701 (D.C. Cir. 1965); Mock v. United States, 329 F.2d 496 (6th Cir. 1964); Vicory v. Taylor, 338 F.2d 954 (10th Cir. 1964); Rodgers v. Bennett, 320 F.2d 83 (8th Cir. 1963); Vandersee v. United States, 321 F.2d 57 (3rd Cir. 1963).

19. 373 U.S. at 16.

20. *Id.*

not been determined against him and that he was entitled to a hearing. This suggests that, setting aside the problem of abuse of remedy,[21] to be entitled to a hearing, a habeas corpus applicant need only assert new facts which, if true, would entitle him to relief.[22] By clarifying the word "ground," the present case seems to have refined the guidelines established in *Sanders*.

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Torts—STRICT LIABILITY AND THE HOME CONTRACTOR—*Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969)

In 1957 plaintiff purchased a home that had been constructed by the defendant in 1951. In 1959 the radiant heating system that had been installed during the home's construction failed, resulting in property damage. Recovery was sought from the defendant on the theory of strict liability [1]

The trial court held that regardless of negligence, defendant was liable on the theory of strict liability because the heating system was defective when installed.[2] The court of appeals affirmed and held, *inter alia*, that the doctrine of strict liability in tort would be applied for the first time in California to sales of real estate.[3]

The traditional defense to an action for damages arising after the sale of realty has been caveat emptor.[4] Although it has lost much of its force in the area of chattels[5] it has persisted in the area of realty Two reasons for this persistence have been advanced: 1) the purchaser has the opportunity to inspect the premises for defects, and if he desires further

21. In the instant case the government did not plead abuse of remedy, so the court under the doctrine of Price v. Johnston, 334 U.S. 266 (1948), could not deny a hearing on this basis. It has been suggested that in order for a court to deny a hearing on the basis of abuse of remedy such abuse must have been the result of a deliberate decision based on an improper motive. Pollak, *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 143 (1963). Hearings have been denied prisoners on the basis of abuse of remedy. *E.g.*, Wong Doo v. United States, 265 U.S. 239 (1924); Jones v. Montana, 232 F Supp. 771 (D. Mont. 1964).

22. If the facts are identical, a hearing may be denied. A recent second circuit decision reversed, on an appeal by the New York Attorney General, a District Court's granting of a hearing on a second habeas corpus application on the ground that the facts were identical and had previously been determined against the petitioner on the merits. Schnitzler v. Follette, 406 F.2d 319 (2d Cir. 1969).

1. Kriegler v. Eichler Homes, Inc., 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).
2. *Id.*
3. *Id.*
4. 4 S. WILLISTON, CONTRACTS § 926 (rev. ed. 1936).
5. *See* UNIFORM COMMERCIAL CODE §§ 2-314, 315.