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Federal Criminal Procedure-Collateral Relief Under 28 U.S.C. Section 2255- Discretion of Sentencing Court to Dismiss Successive Application Without Hearing

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FEDERAL CRIMINAL PROCEDURE—COLLATERAL RELIEF UNDER 28 U.S.C. SECTION 2255—DISCRETION OF SENTENCING COURT TO DISMISS SUCCESSIVE APPLICATION WITHOUT HEARING—Prisoner, sentenced by a United States district court, filed two successive motions to vacate his sentence under 28 U.S.C. section 2255, which provides for a compulsory motion procedure for federal prisoners in lieu of habeas corpus.[1] Under this section, a prisoner is required to petition the court which sentenced him[2] in order to test the legality of his detention.[3] The motion must be

1 Habeas corpus is available to a federal prisoner only if relief by motion proves "inadequate and ineffective" to test the legality of detention. 28 U.S.C. § 2255 (1958). It has been held that § 2255 is "inadequate" when the place of imprisonment is at a great distance from the sentencing court. See Stidham v. Swope, 82 F. Supp. 931 (D.C. Cal. 1949); *cf.* REPORT OF THE JUDICIAL CONFERENCE OF THE SENIOR CIRCUIT JUDGES, September Session 1943 at 24.

2 In this respect, § 2255 differs from habeas corpus, which requires application for relief in the district of incarceration. For a thorough comparison of the procedural differences between § 2255 and habeas corpus, see Longsdorf, *The Federal Habeas Corpus Acts Original and Amended*, 13 F.R.D. 407 (1953).

3 Under § 2255 a prisoner may ask the sentencing court to vacate, set aside, or correct

given a prompt hearing, "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. . . ."[4] If a successive motion is filed for "similar relief" the sentencing court may properly dismiss the motion without a hearing.[5] Both of prisoner's motions were denied by the sentencing court without hearing, although the second motion alleged a new factual ground[6] which, if substantiated, would have entitled him to relief. The court of appeals affirmed, holding that the second motion, even though supported by a new ground, was a motion for "similar relief" under section 2255, which the sentencing court may dismiss without hearing.[7] On certiorari, *held*, reversed, two Justices dissenting. A successive motion is for "similar relief" only when the same ground was decided against petitioner on the merits in a prior proceeding. *Sanders v. United States*, 373 U.S. 1 (1963).

Two seemingly irreconcilable principles have led district and circuit courts to disagree as to when a successive motion is for "similar relief" and may therefore be dismissed without hearing. The first of these principles, that there must be finality of litigation even when personal liberty is at stake, has influenced some courts to view section 2255 as both a remedy for the increased burden placed upon district courts by groundless applications for habeas corpus and a deterrent to spurious applications for section 2255 relief.[8] These courts have held that "similar relief" encompasses not only repetitious motions by a prisoner on the same grounds, but also any subsequent motion which asserts new grounds without an explanation of why such new grounds were not alleged in support of the earlier motion. Other courts have viewed section 2255 as merely a procedural substitute for habeas corpus,[9] affording an applicant exactly the same rights.[10] Thus such courts have found that the second principle, the inapplicability of res judicata to habeas corpus proceedings, controls successive applications for section

his sentence on the ground that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack. . . ." 28 U.S.C. § 2255 (1958).

4 *Ibid.*

5 *Ibid.*

6 The prisoner alleged he was mentally incompetent at the time of his conviction and sentence because of the administration of narcotics while in the county jail pending trial.

7 Sanders v. United States, 297 F.2d 735 (9th Cir. 1961).

8 See Kesel v. Reid, 283 F.2d 365 (D.C. Cir. 1960); Bistram v. United States, 283 F.2d 1 (8th Cir. 1960); Moore v. United States, 278 F.2d 459 (D.C. Cir. 1960); Trumblay v. United States, 278 F.2d 229 (7th Cir. 1960); Turner v. United States, 258 F.2d 165 (D.C. Cir. 1958).

9 See Juelich v. United States, 300 F.2d 381 (5th Cir. 1962); Andrews v. United States, 286 F.2d 829 (5th Cir. 1961); Smith v. United States, 270 F.2d 921 (D.C. Cir. 1959); Stephens v. United States, 246 F.2d 607 (10th Cir. 1957).

10 Courts which adopted this view relied upon the Supreme Court's language in United States v. Hayman, 342 U.S. 205 (1952). That case presented the question of whether § 2255 violated the constitutional prohibition against suspension of habeas corpus. See U.S. CONST. art. I, § 9. To avoid the constitutional question, the Court held that a prisoner's right under § 2255 to be present at a hearing was as broad as under habeas corpus.

2255 relief.[11] Courts which equated section 2255 relief with habeas corpus uniformly rejected even the limited "rule of finality," which would allow a sentencing court discretion to dismiss a subsequent motion which is supported by a new ground, but which fails to explain why the ground was not asserted earlier. Although this "rule of finality" may be technically distinguished from the concept of res judicata, because common-law res judicata requires an automatic bar of any ground which could have been asserted previously, while the finality rule allows a court discretion as to whether to grant a hearing, the tendency of recent cases has been to include both ideas within res judicata.[12] Persuaded that no substantial difference existed between the "rule of finality" and res judicata, these courts viewed the "similar relief" provision of section 2255 as applicable only to motions which presented no new ground.[13] Thus they required a hearing if any new ground was presented in a successive motion.

The principal case affirmed the position that neither res judicata nor the limited "rule of finality" is applicable where personal liberty is at stake. In two distinct steps, the Court arrived at the conclusion that "similar relief" refers only to a motion which asserts a ground previously decided against the prisoner on the merits. First, the Court examined the statute governing successive applications for habeas corpus, which provides that a court has discretion to dismiss a successive application for the writ without hearing "if it appears that the legality of such detention has been determined . . . on a prior application . . . and the petition presents no new ground not theretofore presented and determined. . . ."[14] Interpreting the habeas corpus statute as intending no change in prior case law, which clearly establishes that even a "rule of finality" is inapplicable to successive applications for habeas corpus,[15] the Court concluded that a hearing upon a habeas corpus application may be avoided only if the prisoner presents a claim previously

11 At common law the denial of an application for habeas corpus was not conclusive upon subsequent applications. See *Ex parte* Partington, 13 M. & W. 679, 153 Eng. Rep. 284 (Ex. 1845); Burdett v. Abbot, 14 East 1, 90, 104 Eng. Rep. 501, 535 (K.B. 1811); King v. Suddis, 1 East 306, 102 Eng. Rep. 119 (K.B. 1801). Since the beginning of federal habeas corpus jurisdiction, this principle has been a part of American law. See, *e.g., Ex parte* Burford, 7 U.S. (3 Cranch) 448 (1806).

12 See Juelich v. United States, 300 F.2d 381 (5th Cir. 1962); Andrews v. United States, 286 F.2d 829 (5th Cir. 1961); Smith v. United States, 270 F.2d 921 (D.C. Cir. 1959).

13 These courts reasoned that if § 2255 were as broad as habeas corpus, "similar relief" must be identical in meaning to the statute governing successive applications for habeas corpus, which gives discretion to dismiss without hearing if the successive application contains "no new ground." 28 U.S.C. § 2244 (1958). The principal case affirmed this result.

14 28 U.S.C. § 2244 (1958).

15 The dissent viewed § 2244 as changing prior law by incorporating a "rule of finality." They interpreted the "new ground" provision of § 2244 as meaning not only a ground which had not been previously asserted, but also a ground which the prisoner had not previously known. This position finds support in S. REP. No. 1527, 80th Cong., 2d Sess. (1948), and in early drafts of what became § 2244, which indicate the draftsmen intended the court's discretion to apply to grounds asserted for the first time that could have been raised before. See H.R. No. 4232, 79th Cong., 1st Sess. (1945).

decided against him on the merits,[16] or the Government affirmatively pleads and proves that he has abused the remedy by deliberately withholding a ground from a prior application.[17] Indeed, the Court stated that an attempt to apply either res judicata or a "rule of finalty" to applications for habeas corpus would probably be in violation of Article I, section 9, clause 2 of the Constitution, which forbids suspension of the writ. Second, the Court reasoned that since section 2255 is a compulsory substitute for habeas corpus, to avoid the constitutional question of suspension of the writ the "similar relief" provision must be interpreted to provide an applicant with exactly the same rights as those enjoyed under the habeas corpus statute.[18] Therefore, section 2255 must not subject a successive application to even a limited "rule of finality."

While the Court's interpretation of the "similar relief" provision of section 2255 as the material equivalent of the statute governing successive applications for habeas corpus was in accordance with the cardinal principle that an act of Congress must be construed whenever possible to avoid questions of constitutionality,[19] such an approach is weakened by the glaring verbal discrepancy between the two provisions. In addition, it left the constitutional issue uncertain. From a purely verbal standpoint, considerable stretching is required to interpret "similar relief" to mean "similar grounds." The ordinary meaning of "similar relief" seems to be broad enough to include any subsequent application for vacation of sentence based on wholly new grounds which might have been asserted before, as well as those previously decided on the merits. As the Court pointed out, the history of section 2255 does not reveal a conclusive legislative intent to make requirements for successive applicants more stringent than in habeas corpus,[20] but the marked dissimilarity of language between the two provisions is certainly one indication that Congress had such an intent. Moreover, as a necessary by-product of avoiding the constitutional issue, the Court did not clearly dispose of the argument that barring successive motions by an application of res judicata or the "rule of finality" would merely render section 2255 relief "inadequate or ineffective,"[21] opening the way for a subsequent habeas corpus application, and thus not resulting in an unconstitutional suspension of the writ. Indeed, to support its conclusion that section 2255 must be equated with a statute governing successive applications for habeas corpus, the Court stated that, "even assuming the constitutionality of incorporating

16 See Salinger v. Loisel, 265 U.S. 224 (1924).

17 Abuse of the writ as a ground for denying a hearing on a successive application was established in Wong Doo v. United States, 265 U.S. 239 (1924). However, in Price v. Johnston, 334 U.S. 266 (1948), the Court placed the burden of pleading abuse of the writ on the Government.

18 The Court based this second step in its argument squarely on its prior decision in United States v. Hayman, 342 U.S. 205 (1952).

19 See, *e.g.*, Crowell v. Benson, 285 U.S. 22 (1932).

20 For a complete discussion of the history of § 2255, see United States v. Hayman, 342 U.S. 205, 205-19 (1952).

21 28 U.S.C. § 2255 (1958).

res judicata into section 2255, such a provision would probably prove completely ineffectual, . . ." because "a prisoner barred by *res judicata* would . . . have an 'inadequate or ineffective' remedy . . . and thus be entitled to proceed in federal habeas corpus. . . ."[22] Presumably, if instead of assuming the constitutionality of incorporating res judicata or a "rule of finality" into section 2255, the Court were to rule squarely on the question, it would hold section 2255 unconstitutional in spite of the "inadequate and ineffective" provision, because a prisoner whose motion is barred under section 2255 without a hearing would be forced through an extra procedural step.[23] This conclusion would seem to be indicated by the Court's further comment that "any substantial procedural hurdles which made . . . § 2255 less swift and imperative than federal habeas corpus. . . ."[24] would raise serious constitutional doubts. However, the opinion is unclear on this point, and it might be argued that such language was intended to rebut the argument that res judicata or a "rule of finality" would render section 2255 "inadequate," and not unconstitutional.

The Court's conclusion that "similar relief" must be equated with successive applications for habeas corpus which present "no new ground" will almost certainly increase the burden placed on federal courts by successive applications for section 2255 relief. Motions for section 2255 relief have already risen sharply, from 102 in 1949 to 546 in 1962. Habeas corpus applications have also increased from 481 by federal prisoners and 584 by state prisoners in 1949, to 866 and 1,232 respectively in 1962.[25] When coupled with the Court's recent decisions in *Townsend v. Sain*[26] and *Fay v. Noia*,[27] which expanded the availability of federal habeas corpus to those convicted of state criminal offenses, the decision in the principal case may open the door to a deluge of questionable applications for collateral relief which must be disposed of by already overtaxed federal courts.

The Court did, however, suggest a solution to the problem of successive applications for section 2255 relief which would have the effect of assuring finality of litigation while allowing a hearing on all possible grounds. If a

22 Principal case at 14-15.

23 In Hayman v. United States, 187 F.2d 456, 464 (9th Cir. 1950), it was stated that the delay in requiring a prisoner to apply first for § 2255 relief would be an unconstitutional suspension of the writ.

24 Principal case at 14.

25 *Compare* 1950 DIRECTOR OF U.S. COURTS ANN. REP. 111 *with* 1962 DIRECTOR OF U.S. COURTS PRELIMINARY ANN. REP. 23.

26 372 U.S. 293 (1963). This case established a broad set of rules to guide federal district courts in whether to grant a hearing to applicants convicted of state criminal violations.

27 372 U.S. 391 (1963). Before a state conviction may be contested by federal habeas corpus, the prisoner must exhaust remedies available in state courts. 28 U.S.C. § 2254 (1958). In *Fay v. Noia* the Court interpreted this limit on the availability of habeas corpus to mean that a state prisoner must exhaust only those remedies available to him at the time he files an application in federal court. Thus, if a prisoner allows the time for appeal to expire under state law, cutting off that avenue of relief, his state remedies are considered exhausted.

hearing is granted on the first motion and the prisoner is present, a court need not limit its decision to narrowly alleged grounds or deny a motion merely because it is vague or poorly drafted, but may inquire broadly into the legality of detention so as to discover and dispose of all possible grounds.[28] Since only a limited number of grounds require a hearing,[29] if the first hearing results in the discovery and spreading on the record of the nonexistence of all possible grounds, the court can dismiss a subsequent application without hearing, for the motion, files, and records would then "conclusively show that the prisoner is entitled to no relief. . . ."[30] Although such a solution, if acted upon by sentencing courts, may save judicial time in the future by reducing the number of successive applications on which a hearing will be required, the immediate result will be a further burden on federal district courts. Courts are thus not only expected to grant a hearing on any successive application which presents a ground not previously decided on the merits, but are also asked to increase the time allocated to such hearings by enlarging the scope of their inquiry so as to discover all possible grounds which might ultimately be asserted. While the Court clearly intended to insure prisoners a hearing upon all possible grounds for relief, the increase in the number and duration of hearings in the immediate future as a result of the principal case may well impair the ability of federal district courts to deal efficiently and fairly with section 2255 motions.

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28 See principal case at 22, where the Court expressly recommended this procedure. In an excellent article, which was being published when the principal case was decided, Judge James M. Carter anticipated the Court's suggestions, giving a detailed account of how to conduct the first hearing most effectively to expose all possible grounds for relief. See Carter, *Pre-Trial Suggestions for Section 2255 Cases Under Title 28 United States Code*, 32 F.R.D. 391 (1963).

29 The grounds most frequently advanced are (1) defendant was mentally incompetent at the time of arraignment, plea, trial, or sentence; (2) there was a lack of effective counsel; (3) defendant's plea of guilty was coerced; (4) the United States attorney knowingly used perjured testimony. Carter, *supra* note 28, at 395.

30 28 U.S.C. § 2255 (1958).