by Hon. Michael R. Merz

Habeas Corpus and Magistrate Judges

Two strands of new law in the 1960s led to the creation of the office of U.S. Magistrate Judge. In 1964, Congress passed the Civil Rights Act, prohibiting most importantly racial discrimination in employment. No jury trial right was provided for these cases until 1991. Already, in 1961, the Supreme Court had revivified the Civil Rights Act of 1871[1] by recognizing a private right of action for violations of constitutional rights in *Monroe v. Pape.*[2] Both of these changes added enormously to district court dockets.

The second strand was the Warren Court revolution in criminal procedure. In 1963, *Miranda v. Arizona,*[3] on custodial interrogations, was still three years in the future, but *Mapp v. Ohio,*[4] incorporating the exclusionary rule into the Fourteenth Amendment, and *Gideon v. Wainwright,*[5] providing appointed counsel for all felony defendants, were already on the books. The Supreme Court could not directly enforce its new law and needed an instrument the district courts could use. Modern *habeas corpus* was thus born on March 18, 1963, when *Fay v. Noia,*[6] *Townsend v. Sain,*[7] and *Sanders v. United States*[8] were handed down. As a result of those decisions, a convicted state criminal defendant could often obtain a fresh evidentiary hearing in federal court, preserve issues for federal decision absent a "deliberate bypass" of a state procedure, and file repeatedly in the absence of any *res judicata* effect. Unsurprisingly, the *habeas* filings in district courts skyrocketed.

To provide assistance to District Judges in handling all these new cases without creating more Article III judgeships, the Congress in 1968 passed the Magistrates Act.[9] In 1976, to remove doubts about Magistrate Judge authority in prisoner cases, Congress amended 28 U.S.C. § 636(b)(1)(B) to confirm that authority for both *habeas corpus* and conditions of confinement cases.

Habeas corpus and prisoner conditions of confinement cases form a large part of the duties of many Magistrate Judges. In many districts, including the Southern District of Ohio where I have sat for almost 30 years, *habeas corpus* cases are automatically assigned to a Magistrate Judge upon filing.

Habeas corpus is, of course, an ancient remedy. In *Habeas Corpus from England to Empire,* Paul Halliday describes in rich detail the use of the writ in cases from 1500 to 1800. But the metes and bounds of the contemporary writ have been picked out in great detail by the tension between the great liberalizing sweep of the 1963 decisions and the efforts of later justices—and of Congress in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)—to be more deferential to state court administration of criminal law.

Since 1976, *habeas corpus* practice has been guided by the Rules Governing § 2254 Cases. The *habeas* rules have a much more open texture than, say, the civil rules, and *habeas* practice suffers from a lack of coherent theory. Nonetheless, the rules provide a useful outline.

A *habeas* case begins with the filing of a petition in which a prisoner identifies the conviction under which he is confined and his claims as to why his imprisonment is unconstitutional. The petition is required to give some data on the procedural history of the case—court of conviction, history of any appeals or collateral attacks, and so forth. Because of expanded electronic reporting of appellate decisions, a Magistrate Judge can sometimes determine at the initial pleading stage that the case is without merit by consulting directly what the state court held. For example, if the state courts have decided all of a petitioner's claims on the merits, those decisions are entitled to federal court deference unless they are "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[10]

If the case cannot be decided on the basis of the petition and any reported state appellate decisions, the Magistrate Judge must order the state attorney general to "show cause" for the imprisonment by filing an answer (formerly called a return of writ) which raises any affirmative defenses to the petition and provides the court with the state court record. The petitioner is then given an opportunity to file a reply (formerly called a traverse) to the answer.

When the pleadings are complete, the case is usually ripe for decision. The *habeas* rules allow for discovery upon a showing of good cause. The record filed by the warden can be expanded in appropriate circumstances. The *habeas* rules also provide for an evidentiary hearing, but the scope for these hearings is much reduced from its 1963 scope by the AEDPA and the Supreme Court's decision in *Cullen v. Pinholster.*[11]

As Justice Robert H. Jackson foresaw in *Brown v. Allen,*[12] granting relief is rare, probably because most state trial and appellate judges now serving absorbed the Warren Court revolution as part of

Hon. Michael R. Merz graduated from Harvard College (1967) and the Harvard Law School (1970). He has been a judge since 1977 and is the 2013 recipient of the American Bar Association's Robert Yegge Award for Outstanding Contribution to Judicial Administration. Eschewing the law, his sons choreograph classical ballet and design cellphones.

their law school education. If the district court denies relief, it must also decide if the petitioner should be allowed to appeal; certificates of appealability are granted only if the district court believes its conclusions are "debatable among reasonable jurists."

The process just outlined describes how noncapital *habeas* cases, which form the vast bulk of the *habeas corpus* work of the district courts, are decided. In those states with active death penalty prosecutions, however, capital convictions are inevitably subjected to *habeas* review. Assignment of these cases to Magistrate Judges is rare, but I have had the privilege of managing more than 50 of them since 1995. (At present, the Southern District of Ohio has the second-largest capital *habeas* docket in the country.)

For these cases, Congress has provided funding for two attorneys for each petitioner, in contrast to the *pro se* status of most noncapital petitioners. Often the cases are staffed by public defenders committed to abolishing the death penalty. Pleadings run to hundreds of pages each and state court records to thousands of pages. Almost always there are claims of ineffective assistance of counsel in the state courts, prosecutorial misconduct, sometimes juror misconduct, and always trial court error. Claims are often imaginative because a claim not made in the district court will never become "clearly established" Supreme Court precedent. Analysis is deeply complicated by the presence of a separate sentencing or mitigation stage of the trial. Virtually every appeal draws a published circuit court opinion, and the Supreme Court hears more capital cases than any other type. (In almost 37 years on the bench, I have had only one case, a capital *habeas* case, reach the Court. In *Bobby v. Bies*,[13] they unanimously rejected my decision on a mental disability issue.)

Habeas corpus has a venerable history, protects liberty at its most fundamental level, and provides practitioners with an intricate body of law to master and, if they are fortunate, to improve. Magistrate Judges are privileged to be assigned this work which, for me, far exceeds in its fascination issuance of search warrants or hearing motions to compel discovery. ⊙

Endnotes

[1]42 U.S.C. § 1983.
[2]*Monroe v. Pape*, 365 U.S. 167 (1961).
[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).
[4]*Mapp v. Ohio*, 367 U.S. 643 (1961).
[5]*Gideon v. Wainwright*, 372 U.S. 335 (1963).
[6]*Fay v. Noia*, 372 U.S. 391 (1963).
[7]*Townsend v. Sain,* 372 U.S. 293 (1963).
[8]*Sanders v. United States,* 373 U.S. 1 (1963).
[9]28 U.S.C. § 631, *et seq.*
[10]28 U.S.C. § 2254(d)(2).
[11]*Cullen v. Pinholster,* 563 U.S. ___, 131 S. Ct. 1388 (2011).
[12]*Brown v. Allen*, 344 U.S. 443 (1953).
[13]*Bobby v. Bies*, 556 U.S. 825 (2009).