BENCH MEMO

Re: No. 79-935 - Allen, et al v. McCurry

The underlying issue is whether a state court's ruling on motion to exclude evidence in a criminal trial is entitled to defensive collateral estoppel effect in a subsequent federal-court § 1983 action brought by the state court defendant against the officers who had conducted the allegedly illegal search.

In my view, the state court determination should be collaterally estopping. Granting collateral estoppel effect would conserve judicial resources, preserve comity, and comport with principles of federalism. And it would satisfy the plain meaning of 28 U.S.C. § 1783, which requires that judicial proceedings "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such [s]tate.. . from which they are taken."

From a policy perspective, relitigation is desirable only if the gains in accurate decisionmaking from a second determination outweigh the disadvantages of a duplicative proceeding. I see no significant benefits of relitigation in the present case. The criminal defendant had a full and fair opportunity to litigate the constitutionality of the search in the state proceedings. There is no indication that the trial court was biased or that the trial was less than scrupulously fair. The defendant had a powerful incentive to litigate the Fourth Amendment issue vigorously since the benefit of preserving the Fourth Amendment claim for federal adjudication by not raising it in state court was far out-weighed by the detriment of the increased likelihood of conviction resulting from the failure to move to suppress the evidence in the state trial. And the defendant had a fully adequate opportunity to litigate the issue in state court since he was entitled to the constitutional protections of appointed counsel and the effective assistance of counsel.

It has been said that federal courts are better equipped than state courts to protect federal constitutional rights. Federal judges are not subject to an inherent conflict of interest in assessing the conduct of state officers; life tenure immunizes them from parochial pressures; they have greater expertise in federal law issues and decide them more uniformly; and they are better able to construct a record. But however valid these arguments may once have been, they ring hollow in an era when the state courts are

often more willing to protect individual rights than their federal counterparts. Cf. Pruneyard Shopping Center v. Robins. As this Court recognized in Stone v. Powell, state courts are no longer inhospitable to federal claims and have developed a considerable expertise in the Fourth Amendment area.[1/]

The basic question is one of statutory interpretation: does § 1983 create an exception to the facially applicable rule of § 1738? Nothing in the text of § 1983 so indicates. Under the principle that repeals by implication are not favored, it would seem that § 1983 litigation is governed by § 1738.

Mitchum v. Foster, which held that § 1983 is an "express exception" to the anti-injunction statute, is often cited as supporting the proposition that § 1983 is an exception to the rule of § 1738. But Mitchum was based on the language of the anti-injunction statute and has little bearing on the meaning of § 1738. To the extent that its holding was premised on § 1983, Mitchum found specific language in that statute -- the reference to a "suit in equity" -- indicating that it was an express exception to the anti-injunction statute. Section 1983 contains no

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1/ Under Chapman and Thiboutut, nonconstitutional § 1983 claims will be funnelled into state courts in large numbers. State courts can be expected to become increasingly familiar with the issues raised by such claims. Furthermore, the argument for relitigation resting on the alleged superiority of the federal courts has no relelvance to cases where relitigation is sought by means of a § 1983 suit in state court.

language suggesting that it was intended as an exception to § 1738. Moreover, Mitchum was decided against the backdrop of Younger, under which the most intrusive exercises of federal jurisdiction are avoided on equitable principles in any event. A similar backdrop is not present in the instant case.

Even if § 1983 is not a general exception to § 1738, it can be argued that relitigation should be permitted in the special circumstances of this case: (1) a defendant (2) in a state criminal case (3) seeks to avoid collateral estoppel (4) to the state court's determination on a Fourth Amendment question.

By far the most compelling argument is the fact that the § 1983 litigant was a defendant in the state criminal trial. The premise of this argument is that at the very least § 1983 was designed to ensure that a plaintiff be permitted, if he so chooses, to assert his § 1983 claim in federal court. This principle of "forum choice" is said to be the underlying rationale for Monroe v. Pape, which held that a party need not exhaust state remedies before bringing his § 1983 suit in federal court. It is also said to be implicit in England v. Louisiana Medical Examiners, which held that a party who brings a federal constitutional suit in federal court, but is remitted to state court by Pullman abstention, by so informing the state court can reserve his constitutional claims for subsequent disposition in federal court.

The principle of forum choice would permit relitigation whenever the federal-court § 1983 plaintiff was an "involuntary" litigant in the original state-court action. This would occur if he were a defendant in a state court criminal or civil action, or if he had originally brought suit as plaintiff in federal court but was remitted to state court under an abstention doctrine.

However, I do not find either in the history of § 1983 or in the cases interpreting that provision any convincing evidence for a forum choice principle of such broad scope. Section 1983 was designed to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." Monroe v. Pape, supra, 365 U.S. at 174. If a state court, therefore, was biased or failed to provide fair procedures to a party asserting a federal constitutional right, relitigation should be permitted under § 1983 because the state remedy is not adequate in practice. But if the state court procedures are scrupulously fair, it does not seem to contravene the congressional purpose to hold that the state court's findings are collaterally estopping in a subsequent § 1983 suit.

Monroe v. Pape does provide some support for a forum choice theory. But Monroe's no-exhaustion rule is controversial enough as it is, and should not be extended to provide an unqualified right to a federal forum even after a litigant has had a full and fair hearing in state court. Monroe establishes only that § 1983 is an alternative to state court adjudication. A party with a constitutional claim need not litigate it in state court before

obtaining federal adjudication. But if by virtue of the procedural posture of the case a party is forced to litigate his constitutional claim in state court, and receives a full and fair hearing on the question, Monroe does not establish that the party can reopen the state court's finding in a duplicative federal court action.

Nor do I read England as expansively as do the proponents of forum choice. In the England situation, the § 1983 litigant has invoked federal jurisdiction before any state proceedings have been instituted. The federal courts are under an obligation to decide issues properly brought before them. In deferring to the state courts' determination of state law issues, the federal courts may not thereby abrogate their responsibility to determine the federal issues. England provided a rational means of splitting the litigation so that each court is able to decide the issues arising under its law. But England does not govern the situation where federal jurisdiction has not been invoked prior to any proceedings in state court. In such a case the rule of § 1783 should be controlling.

I do not see the fact that this is a criminal case as making much of a difference. Preclusion resulting from criminal trials was unusual at common law, due to the interplay of mutuality of estoppel and the rule that states are not obligated to enforce sister state criminal judgments. But the present case involves the application of collateral estoppel, not the enforcement of a foreign criminal judgment; and after Blonder-Tongue, the use of non-mutual, defensive collateral estoppel is well-accepted in the

federal courts. Cf. also Parklane Hosiery Co. v. Shore (offensive use of non-mutual collateral estoppel sanctioned in some circumstances). Ashe v. Swenson indicates that it violates the double jeopardy clause for the government to use issues determined in one criminal trial as collateral estoppel in a subsequent criminal trial; but there are no double jeopardy problems in the present case because the subsequent proceeding was civil in nature. Standefer states that the government will not be collaterally estopped by issues determined adversely in a criminal trial of the alleged principal when an aider and abetter is tried for the same crime. But Standefer involved common law collateral estoppel rather than § 1738, and was based on factors not present in the instant case -- the government's compelling interest in punishing crime and the possibility that additional evidence could constitutionally be introduced in the trial of the aider and abetter.

Nor should the fact that collateral estoppel is involved, rather than res judicata, make any difference. It is well-established that § 1738 implicates principles of collateral estoppel as well as res judicata. Denial of collateral estoppel carries with it the implication that the decision of the first forum is suspect on issues of fact or law. The refusal to accord collateral estoppel effect to the judgment of a first forum is just as insulting to the dignity of that forum as would be the refusal to grant its decisions res judicata effect. Indeed, denial of collateral estoppel is sometimes more insulting because under the collateral

estoppel doctrine the issues must have been raised and decided in state court whereas under res judicata the federal issues may never have been raised or passed on by the state tribunal.

Finally, I do not see the fact that the issue is the constitutionality of a search as making a difference. It greatly distorts Stone v. Powell to say that in cutting off relitigation of Fourth Amendment claims through federal habeas, that decision implicitly opened the § 1983 door to relitigation. Nothing in Stone remotely hints that § 1783 would be available to make up for the loss of habeas corpus jurisdiction. Stone was premised on the notion that state courts are just as competent as federal courts to adjudicate Fourth Amendment issues. If the defendant has had an opportunity for a full and fair hearing in state court, and has used that opportunity to obtain a state court adjudication, it does not seem in any way contrary to Stone v. Powell that the defendant should be collaterally estopped when he seeks to relitigate those issues in a federal-court § 1983 suit.

I conclude, therefore, that the state-court determination should be given collateral estoppel effect unless there is some indication that the state judge or jury were biased or that the state proceedings were procedurally inadequate. What about the application of this principle to the facts of the present case?

Ruling on the suppression motion, the state trial court upheld the entry into the respondent's house and the seizure of items in plain view. But the court excluded items found in dressers and tires which were not in plain view. Hence the ruling which is purportedly collaterally estopping against the respondent was partly in his favor. If the respondent claimed in his complaint that the seizure of items in tires and drawers violated his constitutional rights, it would obviously be error for the District Court to have dismissed the complaint on grounds of collateral estoppel.

The issue turns on a construction of the complaint. The petitioners assert that the complaint challenged only the entry and search of the house and not the search of tires or drawers. They contend that the respondent would be entitled to at most nominal damages for the unconstitutional search since this evidence was excluded and did not prejudice him at trial. Therefore, respondent could not have intended to raise this issue in his complaint.

I disagree. Respondent's pro se complaint should be read as generously as reasonably possible. The complaint stated that the petitioners violated his constitutional rights by searching his house without a search warrant. Part of the search of the house included the unconstitutional search of the drawers and the tires. Without getting into the question -- not presented by this case -- of whether this finding was entitled to <u>offensive</u> collateral estoppel effect against the officers, it is at least clear that it cannot be asserted defensively.

Hence in this respect I agree that the District Court erred in granting summary judgment for the petitioners. Even if McCurry can obtain only nominal damages, this is still an issue for trial on the merits. Moreover, it is quite possible that the respondent can obtain more than nominal damages. While he was not injured by the introduction of the illegally seized evidence at trial against him, there remains an injury to his privacy interest in not having police officers rummaging around his personal effects. While the damages may not be great, they are nevertheless real.

Geoffrey Miller 7/16/80