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PRISONERS' RIGHTS—FEDERAL WITNESS PROCESS—STATE TREASURY MUST BEAR EXPENSES OF TRANSPORTING STATE PRISONER WITNESS BETWEEN COUNTY JAIL AND FEDERAL COURTHOUSE WHEN SUCH PRISONER TESTIFIES IN FEDERAL PROCEEDINGS


Prisoners' civil rights actions\(^1\) have become a significant portion of the federal caseload during the last twenty-five years.\(^2\) Apart from general concern over crowded federal dockets,\(^3\) the circuit courts of appeals have struggled to interpret the authority of federal courts to allocate state and federal responsibilities for the transportation and custody of state prisoners who testify as witnesses at federal proceedings.\(^4\) In **Garland v. Sullivan** (1984)...

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1. Frequently, such actions are brought under 42 U.S.C. § 1983, which provides a federal cause of action for any person deprived of constitutional or statutory rights by another person acting under color of state law. 42 U.S.C. § 1983 (1982). Section 1983 specifies that:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

   Id.


4. See Ford v. Allen, 728 F.2d 1369 (11th Cir. 1984) (order requiring Marshals Service to bear full cost of transportation upheld); Wiggins v. County of Alameda, 717 F.2d 466 (9th Cir. 1983) (deciding district court has broad discretion to apportion costs of transporting state prisoner to federal courts), cert. denied, 104 S. Ct. 1425 (1984); Ballard v. Spradley, 557 F.2d 476 (5th Cir. 1977) (upholding district court order requiring state to transport prisoners from regular jail to local jail near federal courthouse and requiring marshals to transport prisoners from local jail to federal courthouse). For a further discussion of the
land v. Sullivan,⁵ the Third Circuit created a split among the circuits when it held that a district court has statutory authority to order a United States marshal to maintain custody of a state prisoner witness while he testifies in the federal courthouse,⁶ but that, absent a finding of special security risks, a district court lacks statutory authority to order a United States marshal to transport a state prisoner witness between the county jail and federal courthouse.⁷ Accordingly, the Third Circuit concluded that the district court in Garland could not shift the expense of producing a witness from the Commonwealth of Pennsylvania to the United States Treasury.⁸

The issue of whether the state or the federal treasury should bear the expenses of compelling with federal witness process⁹ arose in a civil

Fifth, Ninth, and Eleventh Circuits' decisions, see infra notes 52, 61-64 & 68 and accompanying text.

5. 737 F.2d 1283 (3d Cir. 1984), aff'd sub nom. Pennsylvania Bureau of Correction v. United States Marshals Service, 54 U.S.L.W. 4001, 4002 (U.S. Nov. 19, 1985). As this issue of the Villanova Law Review went to press, the United States Supreme Court affirmed the Garland decision. The Court held that federal district courts lack statutory authority to order United States marshals to assume custody of state prisoners outside the federal courthouse.

6. 737 F.2d at 1284. See 28 U.S.C. § 569(a) (1982). Section 569 sets forth the duties and powers of United States marshals, specifically providing that

(a) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in his district, and of the Court of International Trade holding sessions in his district elsewhere than in the Southern and Eastern Districts of New York, and may, in the discretion of the respective courts, be required to attend any session of court.

(b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts and Government of the Canal Zone, and command all necessary assistance to execute their duties.

(c) The Attorney General shall supervise and direct United States marshals in the performance of public duties and accounting for public moneys. Each marshal shall report his official proceedings, receipts and disbursements and the condition of his office as the Attorney General directs.

Id. For a further discussion of the marshals' custodial duties, see infra notes 18-28 and accompanying text.

7. 737 F.2d at 1288. The Third Circuit's holding rested on its analysis of 28 U.S.C. §§ 569(a) and 1651. Section 1651, known as the All Writs Act, provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1982). For a further discussion of the All Writs Act, see infra note 43 and accompanying text. For the text of section 569(a), see supra note 6 and accompanying text.

8. 737 F.2d at 1287. The Third Circuit's decision in Garland is contrary to the decisions of other circuits that have addressed the issue of allocating the costs of transporting prisoner witnesses. For a discussion of the decisions on this issue by the Fifth, Ninth, and Eleventh Circuits, see supra note 4 and infra notes 52, 61-64 & 68 and accompanying text.

9. Ordinarily, to obtain a witness for a federal trial, the court issues a subpoena, which is "a command to appear at a certain time and place to give testi-
rights action by a state prisoner, Richard Garland, against various Philadelphia prison officials.\textsuperscript{10} The presiding magistrate\textsuperscript{11} issued an order directing the United States marshal to transfer a state prisoner witness from a county jail to the United States courthouse in Philadelphia and to maintain custody of that prisoner while he was in the federal courthouse.\textsuperscript{12} The United States Marshals Service, as an intervenor, moved for reconsideration of that order.\textsuperscript{13} The magistrate denied the motion for reconsideration and the Marshals Service appealed.\textsuperscript{14}

Writing for the Third Circuit,\textsuperscript{15} Judge Gibbons considered whether the state or federal treasury should bear the expenses of transporting moneys upon a certain matter." BLACK'S LAW DICTIONARY 1279 (5th ed. 1979). If, however, the witness is a prisoner, the court must issue a writ of habeas corpus ad testificandum directing the custodian to bring the prisoner witness to court to testify. 28 U.S.C. § 2241(c)(5) (1982). Section 2241(c)(5) provides that the writ of habeas corpus ad testificandum shall not extend to a prisoner unless "[i]t is necessary to bring him into court to testify or for trial." \textit{Id.} For a discussion of the writ of habeas corpus ad testificandum, see generally R. Sork, \textit{FEDERAL HABEAS CORPUS} 28-84 (1969).

Section 2241(a) provides that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." 28 U.S.C. § 2241(a) (1982). Section 2254 provides authority for the review of applications for a writ of habeas corpus while section 2255 refers to applications by federal prisoners. \textit{Id.} \S\S 2254, 2255 (1982).


12. 737 F.2d at 1284.

13. \textit{Id.} The Bureau of Corrections, Commonwealth of Pennsylvania, the Sheriff of Philadelphia County, and the City of Philadelphia also intervened. \textit{Id.}

14. \textit{Id.} The courts of appeals have jurisdiction to review final orders emanating from cases tried by consent of the parties before a United States magistrate. 28 U.S.C. § 636(c)(3) (1982).

Section 636(c)(3) provides that "[u]pon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court." \textit{Id.}

15. The case was heard by Circuit Judges Gibbons and Becker and District Judge Atkins of the United States District Court for the Southern District of Florida, sitting by designation. Judge Gibbons wrote for the majority. Judge Becker filed a separate opinion concurring in part and dissenting in part. Judge Atkins filed a brief separate opinion concurring in part and dissenting in part.
prisoner witnesses and maintaining their safe custody while they testify in federal court.\textsuperscript{16} At the outset, Judge Gibbons noted that the federal judiciary cannot order any expenditure by the federal treasury without statutory authority.\textsuperscript{17} Judge Gibbons next pointed out that 28 U.S.C. § 569(a) authorizes the trial court to require the marshal to attend any session of court,\textsuperscript{18} and that, therefore, section 569(a) in effect delegates responsibility for courthouse security to the marshals.\textsuperscript{19} While conceding responsibility for courthouse security, the Marshals Service contended that section 569(a) should not be construed to relieve state custodians of their ongoing duty to maintain prisoner witnesses in secure custody.\textsuperscript{20} The \textit{Garland} court, however, decided that in the interest of security and flexibility, federal trial courts have the power under section 569(a) to order marshals to assume custody of prisoner witnesses while they are in the federal courthouse to testify.\textsuperscript{21} The court specifically noted that no finding of special security risks would be necessary to

\textsuperscript{16} 737 F.2d at 1285. The only issue on appeal from the underlying action was the authority of a district court judge or magistrate to shift any part of the burden of complying with federal process from the state to the federal treasury. \textit{Id.}

\textsuperscript{17} \textit{Id.} The Constitution specifically provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of appropriations made by Law . . . ." U.S. Constr. art. I, § 9, cl. 7.

\textsuperscript{18} 737 F.2d at 1287.

\textsuperscript{19} \textit{Id.} The court relied on its earlier decision in \textit{Story v. Robinson}, in which the Third Circuit held that a federal trial court may order marshals to take prisoner witnesses into custody while the marshal's attendance in court is required. 689 F.2d 1176, 1180 (3d Cir. 1982). In \textit{Story}, the District Court for the Western District of Pennsylvania, in a pending civil case, issued a writ of habeas corpus ad testificandum to the state custodian. \textit{Id.} at 1177. The writ ordered the state custodian to transport state prisoner witnesses to the state institution nearest the federal courthouse. \textit{Id.} The court also ordered the United States Marshals Service to transport these witnesses to and from the state institution for their court appearances as witnesses in a federal trial. \textit{Id.} The court's order reflected the historical practice of the Western District of Pennsylvania. \textit{Id.} at 1178. The Marshals Service, faced with severe financial difficulties, sought to be relieved of all expenses for the production of state prisoner witnesses. \textit{Id.}

In \textit{Story}, the Third Circuit at the outset recognized that 28 U.S.C. §§ 2241(c)(5) and 1651(a) authorize the federal courts to issue writs of habeas corpus ad testificandum to compel the production of prisoner witnesses. \textit{Id.} Although conceding the court's power to issue such a writ, the Marshals Service alleged that it had no duty to respond unless the state custodian first refused to execute the writ of habeas corpus ad testificandum. \textit{Id.} at 1179. The Third Circuit accepted this contention. \textit{Id.}

Thus, the Third Circuit ultimately resolved the issue by following the district court's historical practice and relying on § 569(a) to hold that "state custodians will be in compliance with writs of habeas corpus ad testificandum for state prisoner witnesses if they transport the prisoners to the county jail nearest the federal courthouse and notify the United States Marshals." \textit{Id.} at 1181 (citing 28 U.S.C. § 569(a) (1982)).

\textsuperscript{20} 737 F.2d at 1287.

\textsuperscript{21} \textit{Id.}
justify such an order.\textsuperscript{22}

Judge Gibbons drew a distinction based on federal security interests between ordering federal custody of witnesses in the federal courthouse and ordering federal custody of witnesses at a point outside the federal courthouse.\textsuperscript{23} Judge Gibbons invoked a presumption that “there is no federal court security interest until state prisoners are delivered to the custody of the Marshal of the district at the federal courthouse.”\textsuperscript{24}

By adopting this presumption, the court implicitly overruled its earlier decision in \textit{Story v. Robinson}.\textsuperscript{25} In \textit{Story}, the court held that the Marshals Service was required to assume custody of prisoner witnesses outside the federal courthouse.\textsuperscript{26} Judge Gibbons, in \textit{Garland}, stated that the presumption that no federal court security interest existed until delivery of state prisoners to marshals at the federal courthouse could be overcome by a showing that the witness is particularly dangerous or that the witness' own personal safety is in jeopardy.\textsuperscript{27} Thus, the court concluded that “unless a federal trial court makes a specific finding that special security circumstances exist which require an order that state prisoner witnesses be taken into the Marshal's custody at a situs away from the federal courthouse, section 569(a) does not authorize such an order.”\textsuperscript{28}

As the trial court did not make a finding of special security risks in \textit{Garland}, the Third Circuit held that the trial court lacked statutory authority for its order requiring the Marshals Service to assume the financial responsibility for transporting the prisoner witness from the county jail to the federal courthouse.\textsuperscript{29} Explaining this part of the holding, Judge Gibbons first noted that in \textit{Story} the Third Circuit had concluded that no statute required the court to allocate to the Marshals Service the cost of transporting state prisoner witnesses to the federal courthouse.\textsuperscript{30}

\textsuperscript{22} \textit{Id.} The Third Circuit explained that the trial court may order the marshal to take custody without making a finding regarding special security risks. \textit{Id.} Accordingly, the court noted that such orders are within the broad discretion of the trial court. \textit{Id.} Moreover, the court recognized that “this case presents one of those rare instances in which the trial courts must be recognized as having virtually unreviewable discretion.” \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{Id.} at 1287-88.

\textsuperscript{25} 689 F.2d at 1176 (3d Cir. 1982). For a discussion of the \textit{Story} decision, see \textit{supra} note 19.

\textsuperscript{26} \textit{Id.} at 1181.

\textsuperscript{27} 737 F.2d at 1288. The court noted that the presence of special security risks that could require federal marshals to take custody of a state prisoner witness outside the federal courthouse would be the exception, rather than the rule. \textit{Id.}

\textsuperscript{28} \textit{Id.} Judge Gibbons noted that “[o]bviously the security problem outside the courthouse is of an entirely different order of magnitude than that within.” \textit{Id.} at 1287.

\textsuperscript{29} \textit{Id.} at 1286-87.

\textsuperscript{30} \textit{Id.} at 1285-86. The \textit{Garland} court relied heavily on \textit{Story} in holding that
After examining the statutory authority, Judge Gibbons decided that even a discretionary order making such an allocation of cost to the Marshals Service was not within the power of the trial court.\textsuperscript{31} In reaching this decision, Judge Gibbons recognized that a writ of habeas corpus ad testificandum, the order initially issued by the magistrate, requires that the custodian produce a prisoner witness at trial.\textsuperscript{32} Judge Gibbons stated that prison officials, not the United States marshals, are the traditional custodians of state prisoners.\textsuperscript{33} Since the marshals are not custodians, Judge Gibbons reasoned that the marshals are inappropriate respondents to writs of habeas corpus ad testificandum.\textsuperscript{34}

Thus deciding that the magistrate's order directed to the United States marshal could not be a writ of habeas corpus ad testificandum, Judge Gibbons posited that the appropriate order to compel the compliance of the marshal must be in the form of mandamus.\textsuperscript{35} But, relying on

\footnotesize{28 U.S.C. §§ 569(b), 571, 567(2), and 1651 do not require shifting the burden of cost to the federal government. \textit{Id.} Supported by \textit{Story}, the court concluded that § 569(b) "was not a separate source of judicial authority to issue writs, process, and orders, but only a source of the Marshals' duty to execute them when they have been issued pursuant to some other source of authority." \textit{Id.} at 1285 (citing \textit{Story}, 689 F.2d at 1179). For the text of § 569(b), see supra note 6.

In accordance with \textit{Story}, the \textit{Garland} court also held that § 571 did not furnish authority to relieve state custodians of the duty to comply with federal witness process. \textit{Id.} Section 571(a) provides that "[t]he United States marshals, under regulations prescribed by the Attorney General, shall pay the salaries, office expenses and travel and per diem allowances of United States attorneys, their assistants, clerks and messengers, of the marshals, their deputies and clerical assistants." 28 U.S.C. § 571(a) (1982). Although § 571 authorizes the marshals to act as disbursing officers for the United States Attorney and federal court personnel, the court concluded that this does not relieve state custodians of their duty of compliance with federal witness process. 737 F.2d at 1285.

The court also rejected § 567(2) as an independent grant of authority to relieve the state of the expense of transporting prisoner witnesses. \textit{Id.} Section 567(2) provides that "[u]nder regulations prescribed by the Attorney General, each United States marshal shall be allowed the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards." 28 U.S.C. § 567(2) (1982). Finally, the \textit{Garland} court dismissed the contention that § 1651 requires an order that the Marshals Service assume costs of transporting prisoner witnesses. 737 F.2d at 1286. For the text of § 1651, see supra note 7.

\textsuperscript{31} 737 F.2d at 1286.

\textsuperscript{32} \textit{Id.} Section 2243 requires the writ to "be directed to the person having custody of the person detained." 28 U.S.C. § 2243 (1982). This requirement has been expanded to mean that (1) the proper party respondent should be the petitioner's immediate custodian, (2) the respondent should have the power to produce the body of the petitioner before the court, and (3) the respondent may be required to be within the issuing court's jurisdiction. \textit{R. Sokol}, supra note 9, at 81.

\textsuperscript{33} 737 F.2d at 1286.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.} "Mandamus" is defined by translation as "we command." \textsc{Black's Law Dictionary} 866 (5th ed. 1979). This extraordinary writ has been codified at 28 U.S.C. § 1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or
prior case law, Judge Gibbons acknowledged that the lower federal courts do not have the authority to mandamus federal executive officers, such as United States marshals.\(^{36}\) Unable to find any statutory authority for the magistrate's order to the marshal, Judge Gibbons concluded that the cost of producing the witness could not be shifted from the state to the "deeper pocket" of the federal treasury.\(^{37}\) The Third Circuit accordingly reversed the magistrate's order insofar as it required the marshals to produce the prisoner witness and bear the costs of doing so.\(^{38}\)

Judge Becker concurred in the judgment of the court but, concerned about the split it created among the circuit courts of appeals, and foreseeing problems of judicial administration, wrote separately to discuss perceived weaknesses in the court's reasoning.\(^{39}\)

Judge Becker agreed that writs of habeas corpus ad testificandum traditionally have bound only the custodian to bring the prisoner witness into court and that modification of these writs to permit transfer of custody to federal officials before arrival at the courthouse was impermissible.\(^{40}\) Judge Becker contrasted the court's traditional and rigid employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (1982).

36. 737 F.2d at 1286. In Garland, the Third Circuit relied on two Supreme Court cases, McIntire v. Wood and McClung v. Silliman, for the proposition that the All Writs Act is not a source of authority to mandamus federal executive officers. Id. (citing McClung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813)). In McIntire, the plaintiff filed a motion for a writ of mandamus to the register of the land office in Ohio commanding him to grant final certificates of sale to McIntire for the land. 11 U.S. (7 Cranch) at 504-05. The circuit court was split on whether to issue the writ and appealed to the Supreme Court. Id. at 504. The Supreme Court ruled that the circuit court lacked jurisdiction to issue the writ of mandamus. Id. at 505. The Court held that § 14 of the Judiciary Act of 1789, the predecessor to the All Writs Act, did not provide a source of substantive authority to mandamus federal executive officials. Id.; See 737 F.2d at 1286.

The facts and the parties in McClung were identical to McIntire. 19 U.S. (6 Wheat.) at 598. After the decision in McIntire, the same plaintiff filed suit in the state courts of Ohio and again moved for a writ of mandamus from the circuit court to order the federal land office register to give him final certificates of sale. Id. In the course of reviewing a state court's power to issue a writ of mandamus against a federal official, the Supreme Court again noted that the federal circuit courts lacked the power to issue such a writ. Id. at 605. Since no other court has been delegated this power, the Supreme Court apparently retained sole jurisdiction to issue writs of mandamus against federal executive officials. Id. at 604; 737 F.2d at 1286.

37. 737 F.2d at 1287. For a discussion of the concerns surrounding a state's inability to pay for witness production, see infra notes 54-60 and accompanying text.

38. Id. at 1288.

39. Id. (Becker, J., concurring).

40. Id. at 1288-89 (Becker, J., concurring). Judge Becker stated, "There is no provision anywhere in traditional authority that permits modifications of this writ [of habeas corpus ad testificandum] to allow custody to be transferred to federal officials before the courthouse is reached." Id. at 1289 (Becker, J., concurring).
application of the writ of habeas corpus with the flexible nature of the All Writs Act. 41 While noting that the All Writs Act gives courts the authority to create new writs to satisfy new needs, Judge Becker acknowledged that the authority conferred by the All Writs Act was limited with respect to processes defined by the forms and doctrines of already existing writs. 42 Accordingly, Judge Becker concluded that the existing statutory authority for writs of habeas corpus precluded a district court from issuing a nearly identical writ under the All Writs Act. 43 Nevertheless, Judge Becker stated that the magistrate might have issued a traditional writ of habeas corpus ad testificandum with a supplemental writ, “arguably in the nature of mandamus,” directing the marshals to assume responsibility for transporting the witness. 44

Judge Becker next considered whether the district court had authority to issue a writ of mandamus against the Marshals Service. 45 Judge Becker noted that despite strong ties between the marshals and the federal judiciary, marshals remain federal executive officials. 46 He reluctantly acknowledged that the power of federal courts other than the Supreme Court to mandamus such officials is precluded by the “hoary” Supreme Court cases of McIntire v. Wood 47 and McClung v. Silliman. 48

41. Id. at 1289 (Becker, J., concurring). See also Price v. Johnston, 334 U.S. 266, 282 (1948) (uses and forms of habeas corpus writ are not limited to those forms existing in 1789 but must expand to achieve “the rational ends of law” (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 273 (1942))); accord United States v. New York Tel. Co., 434 U.S. 159, 172 (1977) (“This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained . . . .”).

42. 737 F.2d at 1289 (Becker, J., concurring).

43. Id. Judge Becker summarized:
To rephrase the matter in statutory parlance, 28 U.S.C. § 2241(c)(5) (1982), which gives federal courts authority to issue writs of habeas corpus ad testificandum, may preclude reliance on 28 U.S.C. § 1651 (1982) (the All Writs Act in modern garb) to create processes that mimic section 2241 writs in most of their features but which speak with their own voice on several critical issues.

44. Id. at 1290 (Becker, J., concurring).

45. Id. at 1290-91 (Becker, J., concurring).

46. Id. at 1291 (Becker, J., concurring). In classifying marshals as executive officials, Judge Becker relied on 28 U.S.C. §§ 561(a) and 569(c). Id. (citing 28 U.S.C. §§ 561(a), 569(c) (1982)). Section 561(a) provides that the President of the United States shall appoint the marshal for every judicial district. 28 U.S.C. § 561(a) (1982). Section 569(c) provides that the Attorney General will oversee the marshals’ performance of their public duties. 28 U.S.C. § 569(c) (1982).

47. 11 U.S. (7 Cranch) 504 (1813). For a discussion of McIntire, see supra note 36.

48. 19 U.S. (6 Wheat.) 598 (1821). In McClung, the Supreme Court noted that a federal court of original jurisdiction could not issue a writ of mandamus against a federal executive official. Id. at 605. For a further discussion of McClung, see supra note 36.
Compelled by the "dead hand of precedent," Judge Becker concurred in the judgment but made clear his opinion that the outcome was undesirable because it would detract from the federal courts' flexibility in administering cases involving the vindication of civil rights. In closing, Judge Becker noted that the issue in Garland was ripe for Supreme Court review or legislative action.

In a brief separate opinion, Judge Atkins concurred in the court's holding that in the interests of courthouse security the trial court may order the marshal to take custody of prisoner witnesses while they are in the federal courthouse to testify. However, because he agreed with contrary decisions by the Fifth, Ninth, and Eleventh Circuits, Judge Becker expressed concern that the majority's holding would impair the federal courts' ability to conduct accurate factfinding, especially in prisoner rights cases. Id. Judge Becker feared that valuable testimony might be lost simply because either the state or the Marshals Service would be unable to bear the costs of production of prisoner witnesses. Id. For a discussion of the possible impact of these economic constraints on prisoners' rights, see infra notes 54-60 and accompanying text.

Judge Becker recognized that a split in opinion existed among the circuits, thereby making the question of lower federal court authority over the marshals service worthy of Supreme Court review. Id. Justice Rehnquist suggested that the specific issue in Garland was worthy of review in his dissent from a denial of certiorari in a factually similar case. See California Dept. of Corrections v. United States, 104 S. Ct. 1425 (1984) (Rehnquist, J., dissenting from a denial of certiorari). The Supreme Court recently agreed with Justice Rehnquist, granting certiorari in the instant case earlier this year. Pennsylvania Bureau of Correction v. United States Marshals Serv., 105 S. Ct. 1166 (1985).

For a discussion of the court's holding, see supra note 7 and accompanying text.

In Ballard, the Fifth Circuit upheld a cost-splitting order similar to the one in Garland. The trial court in Ballard ordered the state of Florida to transport state prisoners from their regular jail to local county jails near the federal courthouse. Id. at 481. The trial court then ordered the federal marshals to assume responsibility for transporting prisoners from the county jail to the courthouse. Id.

In sustaining this order, the Fifth Circuit relied on 28 U.S.C. §§ 567 and 569, as well as 28 C.F.R. 0.111(b). The Ballard court noted that marshals may "be required to attend any session of court...execute all lawful writs...and command all necessary assistance to execute their duties." Id. at 481 (citing 28 U.S.C. § 569(a)(b)(1982)). The court also noted that § 567 and 28 C.F.R. § 0.111(b) authorize the payment of money for expenses incurred by marshals in the performance of their duties. Id.

Section 567(2) provides that "each United States marshal shall be allowed the expense of transporting prisoners, including the cost of necessary guards and the travel and subsistence expense of prisoners and guards." 28 U.S.C. § 567(2) (1982).

Section 0.111 outlines some of the marshals' responsibilities, including:
(b) The service of all civil and criminal process emanating from the Federal judicial system including the execution of lawful writs and
Atkins dissented from the court’s holding that the magistrate lacked statutory authority to allocate transportation costs to the Marshals Service.\(^5\)

It is submitted that the Garland decision that the state must bear the exclusive responsibility for transporting state prisoner witnesses to federal courthouses could have a grave impact on the protection of prisoners’ rights.\(^5\) The constitutional right to a fair trial\(^5\) may be jeopardized if the petitioner’s witnesses cannot be produced at trial.\(^5\) When such witnesses are prisoners, their live testimony can be obtained only by the issuance of a writ of habeas corpus ad testificandum.\(^5\) Because the Third Circuit requires a district court to consider the state’s ability to bear the costs of transporting a prisoner witness when deciding whether to issue such a writ,\(^5\) the Garland decision to allocate all of the transpor-

court orders pursuant to section 569(b), Title 28, United States Code.

(d) Administration and implementation of courtroom security requirements for the Federal judiciary.

(j) Receipt, processing and transportation of prisoners held in the custody of a marshal or transported by the United States Marshals Service under cooperative or intergovernmental agreements.


In Wiggins, the Ninth Circuit upheld an order requiring the state to bear all expenses associated with transporting and securing prisoners’ presence at trial. 717 F.2d at 469. In dicta, the Wiggins court stated that “a district court judge has the discretion to allocate the costs of compliance with a writ ad testificandum in any number of combinations. These combinations include the clearly preferable sharing of costs approved in Ballard and Story as well as imposing full costs on the United States . . . or, as in the instant case, imposing the full costs on the state.” Id. (citing 28 U.S.C. § § 567(2), 569(b) (1982)).

In Ford, the Eleventh Circuit upheld an order requiring the Marshals Service to bear the entire cost of compliance with a writ of habeas corpus ad testificandum. 728 F.2d at 1370. The Ford court cited 28 U.S.C. §§ 567(2), 569(a), (b) in support of its holding that “the district court has the statutory authority to impose full responsibility on the United States.” Id.

53. 737 F.2d at 1292 (Atkins, J., concurring in part and dissenting in part).

54. Any petitioner who seeks a writ of habeas corpus ad testificandum to obtain the testimony of a prisoner will be affected by the Garland decision. See id. at 1287-88. It is suggested that the impact of Garland on prisoners will be disproportionately large because prisoners are more likely than other petitioners to require the testimony of prisoner witnesses.

55. U.S. Const. amend. V. The fifth amendment provides that “[n]o person shall be . . . deprived of life, liberty, or property without due process of law.” Id.

56. 737 F.2d at 1291 (Becker, J., concurring).

57. For a discussion of the writ of habeas corpus ad testificandum, see supra note 9 and accompanying text.

58. See Jerry v. Francisco, 632 F.2d 252 (3d Cir. 1980). In Jerry, a state prisoner initiated a § 1983 action against the warden and three prison guards. Id. at 253. At a pretrial hearing, the prisoner requested that the court issue subpoenas for ten prisoner witnesses and make available law books for trial. Id. The magistrate made no ruling on the request for witnesses. Id. During the hearing, the
tation costs to the state necessarily weighs against a decision to issue the writ. In a close decision regarding issuance of the writ, the *Garland* holding could have the effect of forfeiting the petitioners' ability to obtain testimony from prisoner witnesses merely because of the state's monetary constraints.

As a matter of policy, it is submitted that a more flexible rule giving district courts discretion to allocate the financial responsibility for transportation between the state and the Marshals Service would better protect the rights of persons seeking in-court appearances by prisoner witnesses. Judges Becker and Atkins both recognized this need for flexibility in *Garland*. Judge Becker specifically noted that a state's lack

prisoner again requested that at least two prisoner witnesses be presented to testify on his behalf. *Id.* at 254. The magistrate stated that she would defer her ruling, pending presentation of the prisoner's case. *Id.* After the case was presented, the magistrate failed to inform the prisoner whether the witnesses were necessary. *Id.* Subsequently, the prisoner's claim was dismissed. *Id.*

On appeal, the Third Circuit ruled that the magistrate erred in not considering evidence that the witnesses could have provided. *Id.* at 256. The court recognized that it is within the district court's discretion to issue a writ of habeas corpus ad testificandum. *Id.* at 255. The court noted factors, including transportation costs, which the district court must consider in making its decision regarding issuance of the writ. *Id.* Here, the trial court did not abuse its discretion, but rather failed to exercise its discretion and this, the Third Circuit concluded, was erroneous. *Id.*

The Third Circuit in *Jerry* instructed the district court that in determining whether to issue a writ of habeas corpus ad testificandum it should consider:

- the costs and inconvenience of transporting a prisoner from his place of incarceration to the courtroom, any potential danger or security risk which the presence of a particular inmate would pose to the court, the substantiability of the matter at issue, the need for an early determination of the matter, the possibility of delaying trial until the prisoner is released, ... the integrity of the correctional system, and the interests of the inmate in presenting his testimony in person rather than by deposition.

*Id.* at 255 (quoting Stone v. Morris, 546 F.2d 730, 735-36 (7th Cir. 1976) and citing *In re Warden of Wisconsin State Prison*, 541 F.2d 177 (7th Cir. 1976)).

59. By allocating all the costs of transportation to the state, the Third Circuit necessarily increased the costs which the trial court must consider in deciding whether to issue the writ.

60. For a case in which the trial court denied a writ of habeas corpus ad testificandum partially because of transportation costs, see *Maurer v. Pitchess*, 530 F. Supp. 77 (C.D. Cal. 1981), *aff'd in part and rev'd in part without opinion*, 755 F.2d 936 (9th Cir. 1985). In *Maurer*, the plaintiff, a state prisoner, initiated an action under 42 U.S.C. §§ 1983, 1985(3) against the Los Angeles County Sheriff's Department. 530 F. Supp. at 78. Maurer applied for a writ of habeas corpus ad testificandum to secure his own presence at trial. *Id.* at 77. The district court denied his application. *Id.* at 81. As grounds for the denial, the court stated that "[t]he expense, the difficulty, and the potential danger of bringing the plaintiff to court outweigh any benefits that could be secured by the plaintiff's presence."

*Id.*

61. For a discussion of decisions by the Fifth, Ninth and Eleventh Circuits upholding such allocations, see *supra* notes 4 & 52 and accompanying text.

62. 737 F.2d at 1291-92 (Becker, J., concurring). For a discussion of Judge
of financial resources might infringe upon the vindication of a prisoner's civil rights. Likewise, Judge Atkins cited Fifth, Ninth, and Eleventh Circuit decisions authorizing district courts to divide the responsibility for transporting witnesses between the state and the Marshals Service.

It is further submitted that the Third Circuit's decision in Garland was based on an excessively narrow interpretation of the trial court's statutory powers. The Third Circuit concluded that there was no statutory authority for the district court's issuance of a writ of habeas corpus ad testificandum to the Marshals Service because such writs may be issued only to a prisoner's custodian. In Garland, the court defined custodian narrowly, restricting the term to include only the immediate custodian, the state prison official. It is suggested that the other circuit courts of appeals that have addressed this issue have correctly de-

Becker's opinion, see supra notes 39-50 and accompanying text. For a discussion of Judge Atkins' opinion, see supra notes 51-53 and accompanying text.

63. 737 F.2d at 1291-92 (Becker, J., concurring). Judge Becker stated: But where a district court or magistrate determines that the testimony of a state prisoner actually would assist a court or jury in its fact finding capacity, it should not be deterred from obtaining the prisoner because the state is unable to pay the full costs of witness production and because the similarly strapped Marshals Service is itself hard pressed to shoulder any such burden. . . . Yet, given (1) the requirements of Jerry v. Francisco that courts consider the costs to the state before issuing an ad testificandum writ; (2) the principle that issuance of an ad testificandum writ lies in the discretion of the trial court; and (3) financial realities, we fear that, faced with a holding that the court cannot exercise its discretion to order the Marshals and the state to share the costs of transportation, there may be cases in which the district courts may be impelled to exercise their discretion to deny ad testificandum writs when a state is short of funds.

Id.

64. Id. at 1291 (Atkins, J., concurring in part and dissenting in part) (citing Ford v. Allen, 728 F.2d 1369, 1370 (11th Cir. 1984); Wiggins v. County of Alameda, 717 F.2d 466, 469 (9th Cir. 1983), cert. denied, 104 S. Ct. 1425 (1984); Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977)). See, e.g., Ballard, 557 F.2d at 481. In Ballard, the Fifth Circuit stated that "[o]nce the district court has determined that the prisoner's presence is essential, the possibility that a lack of transportation funds or personnel will develop is no justification for refusing to issue the writ." 557 F.2d at 481 (citing with approval Ball v. Woods, 402 F. Supp. 803 (N.D. Ala. 1975), aff'd without opinion sub nom. Ball v. Shamblin, 529 F.2d 520 (5th Cir.), cert. denied, 426 U.S. 940 (1976)).

65. For a discussion of the Third Circuit's interpretation of the trial court's statutory powers, see supra notes 18-38 and accompanying text.

66. 737 F.2d at 1285-86. For a discussion of this conclusion, see supra notes 32-34 and accompanying text. For a discussion of 28 U.S.C. § 2243, requiring that the respondent to a writ of habeas corpus ad testificandum must be the custodian, see supra note 32 and accompanying text.

67. 737 F.2d at 1287. Based on its narrow definition of custodian, the Third Circuit noted that "it is a long leap from authority to compel custodians to produce witnesses necessary for the exercise of jurisdiction, to authority to compel non-custodians to bear the expense of that production simply because they have access to a deeper pocket." Id. (emphasis in original).
fined custodian more broadly to include marshals. 68 Because custodians are defined as persons who guard, protect or maintain others 69 marshals would qualify as custodians, especially in light of their § 567(2) powers. 70 Once marshals are defined as custodians, they are bound to respond to a writ of habeas corpus ad testificandum and to transmit the prisoner to court. 71 Thus, by adopting a broad definition of custodian, federal courts can avoid the necessity of considering the difficult issue of district court authority to mandamus federal executive officials, which the Third Circuit was forced to address in Garland. 72

It is suggested that once a court decides that a marshal qualifies as a custodian, the court must address the underlying question of who will bear the costs of transportation. Under 28 U.S.C. § 567(2), 73 the Marshals Service may expend federal funds to cover the costs of transporting prisoner witnesses to federal courts. 74 Although the precise

68. The Ballard, Allen and Wiggins courts did not specifically address the requirement that the respondent to a writ of habeas corpus be a custodian. However, as the requirement is so fundamental and well recognized, it is submitted that these circuits implicitly defined custodian to include marshals.

Although these decisions lack precedential value in the Third Circuit, it is submitted that the similarity between these cases invited the Garland court to address each of them in detail. The Garland majority, however, failed to discuss these three factually identical cases from the Fifth, Ninth and Eleventh Circuits. Judge Gibbons merely noted that “[t]he Marshals Service has not fared well in the other circuits that have considered this issue.” 737 F.2d at 1286 n.2.

69. See Webster’s Third New International Dictionary (1965).


71. 28 C.F.R. § 0.111(j) (1984). Section 0.111(j) imposes a duty on marshals to transport prisoners who are held in their custody or who are subject to cooperative or intergovernmental agreements. Id. It is submitted that because of its narrow definition of custody the Third Circuit focused on the need for an intergovernmental agreement to authorize the transportation of prisoners. 737 F.2d at 1285. Because § 0.111(j) is framed in the disjunctive, it is submitted that if the marshals are defined as custodians, no cooperative agreement is required to authorize the transportation of prisoners. For the text of § 0.111(j), see supra note 52.

72. It is submitted that if the Third Circuit had defined marshals as custodians, 28 C.F.R. § 0.111(j) would have provided statutory authority for an order requiring the marshal to transport prisoner witnesses, obviating the difficult interpretations of McClung, McIntire and the All Writs Act, which the Third Circuit was obliged to address. For a discussion of the Third Circuit’s interpretation of McIntire, Mcclung, and the All Writs Act, see supra notes 36 & 45-49 and accompanying text.


74. Id. Section 567 provides:
   Under regulations prescribed by the Attorney General, each United States marshal shall be allowed—

   (2) the expense of transporting prisoners, including the . . . subsistence expense of prisoners and guards; and

   (3) other necessary expenditures in the line of duty, approved by the Attorney General.

Id. § 567.
language of the statute refers to "prisoners" in general terms, the Marshals Service contended in *Garland* that this statute applies only to federal prisoners.\(^75\) Yet in its earlier decision in *Story*, the Third Circuit flatly refuted this contention by noting that the "Marshal Service's interpretation . . . [is] more restrictive than that encompassed by the regulations."\(^76\) It is therefore submitted that the Marshals Service is empowered to bear the costs of transporting state prisoner witnesses. The ability of the Marshals Service to bear transportation costs will better protect persons seeking in-court appearances by prisoner witnesses because two sources of funds—the Marshals Service and the State—will be available for this purpose.\(^77\)

Finally, it is submitted that a third statutory provision regarding the marshals' obligation to execute writs—28 U.S.C. § 569(b)\(^78\)—is critical to the resolution of the issues raised in *Garland*. In *Story*, the Third Circuit decided that the marshals' obligation to execute a writ of habeas corpus ad testicandum arises only when the state custodian refuses to execute it.\(^79\) It is suggested that an alternative interpretation of section

75. 737 F.2d at 1285.

76. 689 F.2d at 1179. Although the *Story* holding was implicitly overruled by the *Garland* decision, the *Story* court's interpretation of 28 U.S.C. § 567(2) is still valid and well supported. For a further discussion of *Story*, see supra note 19 and accompanying text.

77. For a discussion of the policy considerations supporting such a decision, see supra notes 61-64 and accompanying text.

78. 28 U.S.C. § 569(b) (1982). For the provisions of § 569(b) regarding the marshals' obligation to execute writs, see supra note 6 and accompanying text.

79. 689 F.2d at 1179. For a further discussion of *Story*, see supra note 19 and accompanying text. The Third Circuit's conclusion is supported by the provisions of the *United States Marshal's Financial Management Manual* of July 1, 1975. The relevant section provides:

**STATE PRISONERS**

**Expenses Incident to Production Prisoners in Federal Court**—

If the state authorities desire to produce the requested prisoner at the place of trial under state guard, the state should advance the guard and prisoner the necessary expenses for travel. The U.S. Marshal should reimburse the state for the expenses and advance any remaining necessary allowances, all of which are to be charged to "Fees and Expenses of Witness" appropriation. However, because of the excess costs involved in this procedure, the U.S. Attorney has been instructed that it would be more preferable to have the prisoner placed in the custody of the U.S. Marshal of the district in which the state institution is located.

State prisoners in the temporary custody of the U.S. Marshal cannot be turned over to a second state requesting custody. It is the Marshals Service's position that in Federal civil rights suits filed by state prisoners against state officials the state should transport the prisoner to and from the Federal Court and bear any of the prisoners [sic] having expenses. The Marshals Service should not reimburse the state for any of their expenses. If the Marshal is ordered to transport such prisoners, the United States Marshals Service Legal Counsel should be immediately notified.

569(b) has been accepted by the Fifth and Seventh Circuits. Under this alternative approach, derived from the plain meaning of the statute, a marshal is obligated to execute a writ if it is lawful.

In light of the important policy of protecting prisoners' rights, and consistent with interpretations of the pertinent statutes by other circuits, it is submitted that the Third Circuit erred in that part of its Garland decision which requires the states to bear the entire burden of transporting state prisoner witnesses to federal courthouses. It is further submitted that by placing the financial burden of transporting prisoner witnesses solely upon the state, the Third Circuit has increased the

80. See Ford v. Carballo, 577 F.2d 404 (7th Cir. 1978); Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977). In Carballo, which involved a prisoner's § 1983 claim, the district court issued a writ of habeas corpus ad prosequendum directing both the marshal and the state prison warden to produce Ford—a state prisoner—at trial. 577 F.2d at 405. Although the writ issued was ad prosequendum, the court noted that it was effectively a writ of habeas corpus ad testificandum because its function was to bring the witness into court to testify. Id. at 407 n.1. The marshal served the writ on the warden and informed him that the United States Marshals Service would not transport Ford. Id. at 406. In response to the writ, the warden produced the prisoner at trial and maintained custody of him throughout the trial. Id. After the trial, the warden requested reimbursement from the marshals for the cost of transporting and guarding Ford during trial. Id. The district court denied this request. Id. On appeal, the Seventh Circuit reversed, stating that "it was an abuse of [trial court's] discretion to later refuse the state's request for reimbursement of the costs in carrying out that order." Id. at 408. The court noted that § 569(b) required a marshal to execute a properly issued writ. Id. at 407.

81. For the text of § 569(b), see supra note 6.

82. See Ford v. Carballo, 577 F.2d 404, 407 (7th Cir. 1978); Ballard v. Spradley, 557 F.2d 476, 481 (5th Cir. 1977). The Carballo court elaborated:

We do note, however, and consider it a serious matter, that the Marshal decided that all that was necessary on his part was to notify the Warden that the Marshal's Service would not transport the prisoner. Although a motion to modify the writ had been filed, that motion had not been relied upon at the time of trial and 28 U.S.C. § 569(b) clearly required that the Marshal execute the writ. The fact that a controversy may have existed as to who should actually transport and suffer the expense of producing the prisoner had no effect upon the existing writ and did not authorize the Marshal to independently disregard a direct order of the court.

577 F.2d at 407.

83. For a discussion of the policy considerations arising from the Garland decision, see supra notes 54-63 and accompanying text.

84. For a discussion of the interpretations of the pertinent statutes by other circuits, see supra note 52 and accompanying text.

85. In a second part of the Garland decision, the Third Circuit stated that marshals must assume custody of state prisoner witnesses while they are in a federal courthouse to testify. 737 F.2d at 1287. Section 569(a) clearly authorizes such an interpretation. See 28 U.S.C. § 569(a) (1982). For a discussion of the other, more controversial part of the Garland decision, see supra notes 15-38 and accompanying text.
undesirable possibility that the state's finances may limit the production of such witnesses in federal court.86

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86. For a discussion of how this possibility could arise, see supra notes 54-63 and accompanying text.