

*In the interest of space, these five additional legal cases (not included in the September-October 2009 issue of Training Notes) have been posted on MDLE.net for your review. The cases are as follows:*

- *No Freestanding Federal Constitutional Right to Access State Evidence for DNA Testing (Supreme Court of U.S., District Attorney's Office v. Osborne)*
- *Police Officer's Testimony Concerning an Informant's Detailed Description of Defendant is Hearsay (Maryland Court of Appeals, Parker v. State)*
- *Permissible Trial Use of Statements Obtained in Violation of the Sixth Amendment (Supreme Court of U.S., Kansas v. Ventris)*
- *Invoking Sixth Amendment Rights to Counsel at Arraignment does not preclude subsequent Interrogation without presence of Counsel (Supreme Court of U.S., Montejo v. Louisiana)*
- *State Law Shielding Correctional Officers from Federal § 1983 Suits Violates Constitution (Supreme Court of U.S., Haywood v. Drown).*

**No Freestanding Federal Constitutional Right to Access State Evidence for DNA Testing** - In a lengthy opinion the Court found no freestanding federal constitutional right exists for a convicted individual to obtain post-conviction access to DNA evidence in the possession of the State in order to have it tested to demonstrate his innocence.

For strategic reasons (the defense attorney was concerned that a DNA test would provide evidence of the defendant's guilt), the defendant's attorney did not request the DNA testing of evidence be done at the time of the trial, although the defendant alleged that he had urged the attorney to do so. After being convicted, the defendant sought post conviction relief from the State Appeals court on the basis of constitutionally ineffective assistance of counsel. The claim was denied. The defendant also sought the testing that his attorney had failed to have performed. The State Appeals court concluded that he had no right to the test.

The defendant brought a 42. U.S.C. §1983 action in the federal courts claiming the Due Process Clause gave him a right to the evidence so that the DNA test might be performed. It is this action that was reviewed by the Supreme Court.

The Court noted that the protections afforded a defendant before conviction (presumption of innocence, etc.) disappear after conviction at a fair trial. Accordingly, State courts have more flexibility in deciding what procedures are needed for post conviction relief. Federal courts may upset a State's post conviction relief procedures only if they are fundamentally inadequate to vindicate substantive rights.

The Court noted that the State had procedures to provide for this relief. However, the defendant brought the § 1983 action without trying to use the State process. The Court characterized his action as an attempt to "sidestep the State process through a new federal law suit". While it is not necessary for the defendant to exhaust state law remedies, the Court found it difficult to criticize the State's procedures when the defendant had not invoked them.

In summary, the Court found that recognizing a 14<sup>th</sup> Amendment Due Process right brought under 42 U.S.C. § 1983 would take the development of rules and procedures in this area out of the hands of the State legislatures and the State courts and turn it over to the federal courts. It stated, “Establishing a freestanding right to access DNA evidence for testing would force us to act as policymakers, and our substantive-due-process rulemaking authority would not only have to cover the right to access but a myriad of other issues” (e.g. Constitutional obligation to preserve forensic evidence. How long must the evidence be preserved? Does the State have an obligation to gather such evidence? etc.).

The Court observed, “DNA evidence will undoubtedly lead to changes in the criminal justice system. It has done so already. The question is whether further change will primarily be made by legislative revision and judicial interpretation of the existing system, or whether the Federal Judiciary must leap ahead – revising (or even discarding) the system by creating a new constitutional right and taking over responsibility for refining it.” It concluded, “That task belongs primarily to the legislature.” *District Attorney’s Office v. Osborne*, 129 U.S. 2308 (2009)

**Police Officer’s Testimony Concerning an Informant’s Detailed Description of the Defendant is Hearsay** - Parker was arrested following a plain clothes detective’s observations of him following a tip the detective had received from a registered confidential informant. The informant told the detective that a “black male wearing a blue baseball cap and black hooded sweatshirt was at the corner of Carey and Laurens selling heroin from his person, meaning that the drugs were on him.”

During the trial, the officer testified concerning these details in these statements provided to him by the informant. The informant did not testify at the trial and the defense objected to the detective’s testimony concerning the informant’s statements on the basis that it was hearsay. The detective also testified that Parker matched the informant’s description, and that he recovered 16 gel caps of heroin from Parker’s pocket and trouser waistband. At trial, Parker denied that the officer had found the gel caps on him. After deliberating for a considerable period of time and twice reporting that it was deadlocked, the jury finally convicted Parker of possession of heroin.

The defense filed an appeal on the basis that the detective’s testimony related to the informant’s statements was hearsay, and that it violated the defendant’s Sixth Amendment confrontation right. The Court of Appeals did not reach the Sixth Amendment argument, since it found that the detective’s testimony was hearsay.

In its analysis, the Court of Appeals recited that Maryland Rule 5-801 defines hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” While the declarant’s (informant’s) statement was introduced by the detective’s testimony at trial, the State contended it was not offered for the truth of the matters included in the statement (i.e. that a black male wearing a blue baseball cap and black hooded sweatshirt was at the corner

of Carey and Laurens selling heroin from his person, meaning the drugs were on him). Instead, the State contended that the informant's statement was included in the detective's testimony so that the detective might explain why he was at the scene where the alleged crime was being committed.

The Court recognized that generally an extrajudicial statement is admissible as non-hearsay when it is introduced for the purpose of showing that the person relied upon and acted on the statement – not for the purpose of showing that the facts in the statement are true. For example, an extrajudicial statement might be used to demonstrate that an officer had probable cause, the lawfulness of the arrest, the admissibility of evidence obtained through a search made in connection with an arrest.

The Court noted that it would have been sufficient for the officer to establish the reason for his presence at the corner of Carey and Laurens by stating that it was on the basis of "information received," or conveyed the basis for his presence at the corner in other manner that was uninformative as to details in the informant's out-of-court statement that inferred Parker's guilt. The description of Parker in this out-of-court statement to which the detective testified at trial was so detailed that it virtually created an inescapable inference to the jury that Parker was selling heroin and persuasive as to Parker's guilt.

The Court observed that generally when an officer's testimony provides specific information received from an informant that it has been held to be inadmissible hearsay. In such instances it can be concluded that the jury is likely to misuse the informant's extrajudicial statement as substantive evidence of guilt.

In this case, the use of the statement as substantive evidence of guilt was not only introduced during the State's case-in-chief, but further bolstered by the State's reference to it in closing arguments. The prosecutor stated in the closing argument to the jury, "He told you he got a tip from his registered confidential informant that an individual wearing jeans and a black hoody was selling heroin at this corner. So he responded to the corner and what did he see. He saw Mr. Parker who matched that description." The State therefore used the hearsay statement to corroborate the detective's account that Parker was engaging in illegal narcotic activity. The judgment of conviction was reversed and the case remanded to the circuit court for a new trial. *Parker v. State*, 408 Md. 428 (2009).

#### **Permissible Trial Use of Statements Obtained in Violation of the Sixth Amendment -**

Ventris and Theel were arrested for murder and robbery. While Ventris was awaiting trial, the State planted an informant in Ventris's cell. During conversations with the informant, Ventris admitted that he was the trigger man in the murder. The prosecution recognized that the statements made by Ventris to the informant were a violation of his Sixth Amendment guarantee to counsel. The State conceded that such statements are inadmissible under the exclusionary rule. Therefore, it did not use the statements in its case-in-chief against Ventris.

However, during the defense portion of the trial Ventris took the stand and blamed the murder and robbery on Theel. The prosecution then called the informant to testify and used the statements made by Ventris to the informant to impeach Ventris.

Despite the State's concession that the statements of Ventris were elicited in violation of his Sixth Amendment guarantee to counsel, the Court's decision spent considerable time reviewing the law related to the Sixth Amendment guarantee to counsel and emphasized these statements were unquestionably obtained in violation of the Sixth Amendment. It stated that the right to counsel "...extends to having counsel present at various pretrial 'critical' interactions between the defendant and the State,...including the deliberate elicitation by law enforcement officers (and their agents) of statement pertaining to the charge." In this case, the planted informant would be an agent of law enforcement.

Having confirmed the statements were elicited in a manner that violated the defendant's Sixth Amendment guarantee to counsel, the Court clarified that the question presented in this case was whether after the State elicited statements in violation of the defendant's Sixth Amendment rights, is the State precluded from countering the defendant's testimony by having the informant testify concerning the defendant's contradictory statements? It asked, "...what is the scope of the remedy for a violation that has already occurred."

It concluded that the interests safeguarded by excluding the statements are outweighed by the need to prevent perjury and assure the integrity of the trial process. It was unwilling to permit the criminal defendant to use the fact that the statements were obtained in violation of the Sixth Amendment to provide himself with "a shield against contradictions of his untruths."

It further explained that excluding these statements to impeach the defendant's testimony would not be an appreciable deterrence to the State. It reasoned that the probability that evidence gained in this manner being used for impeachment purposes is very small. Obtaining evidence in this manner in violation of the Sixth Amendment upon the speculative possibility that it may be able to be used to impeach the defendant cannot be permitted to allow perjurious statement to go unchallenged. It also reasoned that officers have "significant incentive" to ensure statements are lawfully obtained, since they can be used for all purposes, rather than for the limited prospect that they may be able to be used to impeach a defendant's testimony. *Kansas v. Ventris*, 129 S.Ct. 1841 (2009)

**Invoking Sixth Amendment Right to Counsel at Arraignment does not preclude subsequent Interrogation without presence of Counsel** – The Supreme Court held in *Michigan v. Jackson* 475 U.S. 625 (1986) that custodial statements made by a defendant were required to be excluded if they were made to police outside the presence of counsel after the Defendant had invoked the Sixth Amendment Right to counsel at arraignment or a similar proceeding. On May 26, the Court abandoned the holding in that case.

The Court considered the case of Jesse Montejo who was accused of murder and robbery. He waived his *Miranda v. Arizona* rights and was interrogated by the sheriff.

During the interrogation he admitted to committing the murder. Subsequently he was presented to a judicial officer at a preliminary hearing, at which time the court ordered that the Office of Public Defender be appointed to represent Montejo. The appointment was made without a request being made by Montejo.

Later that afternoon, Montejo was asked by detectives to accompany them to locate the murder weapon, which he had said in the previous interrogation was thrown into a lake. He was again read his *Miranda* rights, but agreed to accompany the detectives. During the journey with the detectives he wrote a letter of apology to the victim's widow. Upon returning, he met with his attorney who was displeased that the detectives had interrogated Montejo outside his presence.

Montejo's letter of apology was introduced at his trial. He was convicted of 1<sup>st</sup> degree murder. An appeal was lodged based on the *Jackson* decision. The appeal attacked Montejo's waiver of his Sixth Amendment right to the presence of counsel after the court had appointed counsel for him at the preliminary proceeding.

The Supreme Court framed the issue by stating, "The *only* question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances." The Court reasoned that the *Jackson* rule as posited by the defense "...would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant."

The Court not only refused to adopt the defendant's interpretation of *Jackson*, it stated, "*Michigan v. Jackson* should be and now is overruled." The Court's basis for overruling the 33 year-old case, was that it is "unworkable," achieved little in the way of preventing unconstitutional conduct, and there are other cases that will prevent police conduct that will produce "badgering-induced involuntary waivers" that are admitted at trial.

The principal cases relied on by the court in finding the *Jackson* case to be "simply superfluous" are *Miranda v. Arizona*, 384 U.S. 436 (1966) – defendant has the right to have counsel present during interrogation; *Edwards v. Arizona*, 451 U.S. 477 (1981) – interrogation must stop once the right to counsel has been invoked by the defendant, and *Minnick v. Mississippi*, 498 U.S. 146 (1990) – defendant's interrogation may not be resumed until counsel is present. The court found that the policy sought to be furthered by the *Jackson* case (preventing the badgering an arrested suspect) is adequately served by these three cases. It found that the *Jackson* case had "marginal benefits" and that these benefits were out weighed by the substantial costs it imposed on the truth-seeking process and the criminal justice system. *Montejo v. Louisiana*, \_\_\_ S.Ct. \_\_\_ (2009) (2009 WL 2208348)\*.

**State Law Shielding Correctional Officers from Federal § 1983 Suits Violates Constitution** – An inmate filed an action in the New York trial court seeking damages under 42 U.S.C. § 1983. The action was dismissed by the trial court, noting it did not have jurisdiction since the New York state legislature enacted a law divesting the State's

court of general jurisdiction of any authority to hear claims (based on either State or federal statutes) for damages brought by prisoners against correctional officers.

The State's highest appeals court (Court of Appeals) affirmed the dismissal in a 4-3 decision. The Supreme Court of the United States reversed the State's Court of Appeals in a 5-4 decision. The closeness of the vote in both the State Appeals court and the Supreme Court indicates the subtitle nature of the issues presented by the case.

At its core, this case is not about the narrow issue presented by the factual scenario of whether a State can bar a prisoner from bringing a federal § 1983 suit in the State's trial courts for damages against State correctional officers. It presents a more broad question of whether the Supremacy Clause of the United States Constitution precludes a State from statutorily providing exceptional treatment of a limited category of § 1983 claims.

The Court emphasized, "In our federal system of government, state as well as federal courts have jurisdiction over suits brought pursuant to 42 U.S.C § 1983" and that "...federal law is as much the law of the several States as are the laws passed by their legislatures." Furthermore, "...state courts as well as federal courts are entrusted with providing a forum for the vindication of federal rights violated by state or local officials action under color of state law." Therefore, there is an assumption that 'state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States'.

This State responsibility can be avoided only on two basis--❶ by Congress ousting the State of jurisdiction; or ❷ by a "neutral state rule regarding the administration of the courts". Since Congress had not ousted the State trial courts of jurisdiction, the only question was whether the State statute was a neutral jurisdictional rule of judicial administration. A finding that the state statute is "neutral" is an important first step to upholding the statute because it is not permissible for a State to craft jurisdictional grounds to skirt its responsibility and thereby distance itself from a federal law because it disagrees with it.

The Court found the New York statute to be unique, stating "...we have yet to confront a statute like New York's that registers its dissent by divesting its courts of jurisdiction over a disfavored federal claim in addition to an identical state claim."

However, removing the State trial court's jurisdiction over claims that are brought based on State statutes as well as federal statutes (and thereby attempting to give the appearance of establishing an "equal treatment" of the manner in which both State and federal causes of action are treated) was not sufficient to uphold the constitutionality of the statute on the basis that it meets the "neutral treatment" test. The analysis of neutrality does not end with a finding of an absence of discrimination in the way both State and federal claims are treated. It is only the beginning that prompts further analysis.

The Court concluded that the New York State legislature divested the State trial courts of jurisdiction over cases brought by inmates seeking damages against correctional officers because it regarded these suits to be too numerous or too frivolous (or both). In doing so, it shielded a narrow class of defendants (i.e. correctional officers) from liability for damages.

In the case of the New York State statute, actions for damages under § 1983 could be brought in the State trial court to sue all manner of other State officers. In addition, declaratory and injunctive relief against a correctional officer could also be brought in the State trial court. It was only the narrow class of defendants (prisoners) who were denied access to the State trial courts for the purpose of bringing particular claims (damages) against particular individuals (correctional officers).

The Court concluded that State law was “an immunity statute cloaked in jurisdictional garb” and that the State was not a liberty to “...shut the courthouse door to federal claims that it considers at odds with its local policy.” *Haywood v. Drown* \_\_\_ S.Ct. \_\_\_ (2009)