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Recent Developments: Arey v. State: In a DNA Post-Conviction Proceeding, a Prosecutor Must Diligently Search All Places Where the Evidence Could Reasonably Be Found in Order to Ascertain That the Evidence No Longer Exists

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RECENT DEVELOPMENT

AREY V. STATE: IN A DNA POST-CONVICTION PROCEEDING, A PROSECUTOR MUST DILIGENTLY SEARCH ALL PLACES WHERE THE EVIDENCE COULD REASONABLY BE FOUND IN ORDER TO ASCERTAIN THAT THE EVIDENCE NO LONGER EXISTS.

By: Joseph Lane

The Court of Appeals of Maryland held that in a DNA post-conviction proceeding under section 8-201 of the Criminal Procedure Article, a prosecutor must diligently search all places where the evidence could reasonably be found in order to ascertain that the evidence no longer exists. *Arey v. State*, 400 Md. 491, 929 A.2d 501 (2007). In so holding, the Court clarified that although inmates do not have a statutory or constitutional right to either an evidentiary hearing or court-appointed counsel, the Court has inherent power to hold such hearings and ordinarily should do so in the interest of justice. *Id.* at 491, 929 A.2d at 501.

In April, 1974, a jury convicted Douglas Arey ("Arey") of first-degree murder and use of a handgun in the commission of a crime of violence, sentencing him to life in prison and a concurrent sentence of ten-years for the handgun violation. The prosecution's case rested in part on blood tests taken from Arey's shirt, which was shown to contain the blood types of both Arey (type O) and the murder victim (type AB). Arey argued both blood types were found on his shirt because, during his initial police interview, he was picking pimples on his face and wiping the blood on his shirt. The blood from his pimples mixed with the bacteria from his face, thereby skewing the laboratory results and leading to a finding that there was AB type blood on the shirt, rather than solely type O. Despite Arey's argument, the jury found for the prosecution and convicted Arey.

On May 7, 2002, while acting pro se from prison, Arey filed a petition to the Circuit Court for Baltimore City under section 8-201 of the Criminal Procedure Article requesting that his clothes, which were used as evidence in his 1974 case, be retrieved for DNA testing. Arey wanted to show that only his blood was on the shirt and that the

original laboratory technician had been wrong. On August 8, 2005, the circuit court responded to Arey's petition by sending a letter to him and the State reporting that an assistant public defender informed the court that she was told that the evidence had been destroyed many years earlier. The circuit court gave Arey thirty days to provide the court with information indicating that the evidence was still in existence. In response to this letter, Arey filed a pleading asking the circuit court to mandate that the State enter affidavits offering first-hand knowledge that the State searched for the requested evidence. Arey also requested an evidentiary hearing for appointment of counsel in the same pleading. The circuit court responded by scheduling a hearing, with the caveat that the hearing would be cancelled if the State supplied an affidavit of a person with first-hand knowledge stating that the State no longer had the evidence. Thereafter, the State provided an affidavit from the Sergeant-in-charge of the Evidence Control Unit ("ECU") in Baltimore City, stating that he could not locate the requested evidence in the ECU database or forms. The circuit court cancelled the hearing after the affidavit was filed. Arey responded by filing motions to strike the filing of the affidavit and the Order which cancelled the hearing, both of which were denied. Under section 8-201(j)(6), Arey noted a timely appeal directly to the Court of Appeals of Maryland, which was granted.

The first issue the Court addressed was whether the State failed to show that the evidence no longer existed by merely entering an affidavit from a police officer who checked the ECU. *Arey,* 400 Md. at 501, 929 A.2d at 507. In deciding this issue, the Court analyzed *Blake v. State*, 395 Md. 213, 909 A.2d 1020 (2006), which held that a court should not dismiss a petition for testing before the individual has time to respond. *Arey,* 400 Md. at 501-02, 929 A.2d at 507 (citing *Blake*, 395 Md. at 222, 909 A.2d at 1025). *Blake* further noted that since the State is in possession of the evidence, it has the burden of establishing that it no longer exists, and merely stating that it no longer exists will not suffice. *Arey,* 400 Md. at 502, 929 A.2d at 507 (citing *Blake*, 395 Md. at 227, 231, 909 A.2d at 1028, 1031).

In order to determine what steps the State must take to conclude that the evidence in question no longer exists, the Court looked to a report ("NIJ Report") published by the National Commission of the Future of DNA Evidence, a group created by the National Institute of Justice. *Arey,* 400 Md. at 502, 929 A.2d at 507. The NIJ Report recommended that the State look for evidence in the "most likely places," including prosecutors' offices, defense investigators' offices,

hospitals, evidence rooms, crime laboratories, clerks of courts offices, and court reporters. *Id.* at 502-03, 929 A.2d at 507-08. Additionally, the Court required that the State first identify the protocol for storing evidence that was in place at the time of the trial in order to help guide the search for the evidence. *Id.* at 503, 929 A.2d at 508.

Applying these guiding principles to the case at bar, the Court held that searching the ECU alone did not suffice. *Id.* at 503, 929 A.2d at 507. Rather, the State was required to search any place in which the evidence could reasonably have been found. *Id.* at 503-04, 929 A.2d at 508. In addition, the State should have determined the protocol for dealing with evidence at the time of Arey's 1974 trial and looked in other places for the evidence beyond the ECU. *Id.* at 504, 929 A.2d at 508. At the very least, the State should have searched any place referred to in the trial testimony as possible storage places for the evidence such as labs, court property rooms, and the judge's chambers. *Id.* at 504, 929 A.2d at 508-09.

The next issue addressed by the Court, although not necessary to the disposition of the case, was whether the trial court erred in placing the burden on Arey rather than the State to produce evidence that the clothes in question still existed. *Id.* at 504, 929 A.2d at 509. The Court noted that in order for the State to satisfy its burden of persuasion, it must first set forth either a direct or circumstantial *prima facie* case that the evidence no longer exists. *Id.* at 505, 929 A.2d at 509. If the State meets that burden, however, the onus is on the petitioner to demonstrate that the evidence does exist. *Id.* at 505, 929 A.2d at 509.

The third issue which the Court addressed was whether principles of due process entitled Arey to an evidentiary hearing. *Id.* at 505, 929 A.2d at 509. The Court decided that while an evidentiary hearing is not required under the due process clause of the Maryland Declaration of Rights, the court should consider the fairness concerns regarding wrongful conviction or sentencing which underlie due process, and should hold a hearing whenever the court determines that there is a genuine material issue of fact as to whether the evidence still exists. *Id.* at 507, 929 A.2d at 510.

The development of DNA testing represents one of the most significant changes to the criminal legal system in decades. The importance of DNA testing cannot be overlooked. As such, Maryland criminal practitioners should be well aware of any developments in the law which may help in their ability to acquit those falsely accused and ensure that prison is a place only for the guilty.

Furthermore, this case could not have come at a more relevant time. In April of 2007, the United States saw the 200th DNA conviction reversal as a result of DNA testing. *U.S. sees 200th DNA conviction reversal, available at http://www.reuters.com.* If one considers the number of convictions in the United States each year, it is impossible to ignore the fact that at least a small percentage of those convictions are erroneous.