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lously honored' test was met, in the instant case, from the facts that the initial interrogation took only about twenty minutes, that there was over a two hour period in between interrogations, that *Miranda* warnings were fully given both times and great care was taken both times to ensure that Mosley understood them, and that the two interrogations concerned different and separate factual occurrences. Whereas the Michigan Court of Appeals viewed Mosley's case as factually similar to *Westover v. United States,* 384 U.S. 436 (a companion case to *Miranda*), the United Staes Supreme Court found marked factual differences in that *Westover* involved prolonged, sequential interrogations with no significant time lapses and without any warnings to the arrestee. In essence, the Court found no overreaching by the state, that Mosley's statement was voluntarily and informedly given, and that the principles of *Miranda* were preserved. For these reasons, the decision of the Michigan Court of Appeals was reversed in favor of the state and the case remanded.

Justice White concurred in the result, but would have gone further than the Court and would have overruled *Miranda* to the extent that the ". . .*Miranda* decision might be read to require interrogation to cease for some magical and unspecified period of time following an assertion of the 'right to silence,' and to reject voluntariness as the standard by which to judge informed waivers of that right." 44 L.W. at 4020.

Justice Brennan, joined by Justice Marshall, dissented on the ground that ". . .as to statements which are the product of renewed questioning, *Miranda* established a virtually irrebuttable presumption of compulsion . . . and that presumption stands strongest where, as in this case, a suspect, having initially determined to remain silent, is subsequently brought to confess his crime. Only by adequate procedural safeguards could the presumption be rebutted." 44 L.W. at 4021. Justice Brennan would find two alternative adequate safeguards to be a speedy arraignment or presence of counsel. He said:

"I do not mean to imply that counsel may be forced on a suspect who does not request an attorney. I suggest only that either arraignment or counsel must be provided before resumption of questioning to eliminate the coercive atmosphere of in-custody interrogation. The Court itself apparently proscribes resuming questioning until counsel is present if an accused has exercised the right to have an attorney present at questioning." 44 L.W. at 4021, n.4.

The dissent also feels that the subject-matter of the two interrogations were related because the informer's tip for the arrest covered both sets of crimes, the homicide arose from the factual context of a robbery, and defendant had told the initial interrogator that he didn't want to say "[a]nything about robberies," 44 L.W. at 4022. That is, the dissent believes the right to remain silent was exercised in a manner to cover the subject-matter of the second interrogation.

In evaluating the *Mosley* case, it appears to me that the subject-matter test is a *non sequitur*; i.e., that *Mosley* stands for the proposition that repeated interrogations are proper if (1) *Miranda* warnings are given before each interrogation session, (2) there are significant time lapes between sessions, (3) each session ceases when the defendant exercises his Fifth Amendment rights, and (4) the factual case-by-case context does not show relentless badgering of a suspect in such a manner as to coerce his testimory or undermine the voluntariness factor essential to an informed and willful statement. As a practical matter, strong limits remain upon the ability of the state to repeatedly custodially interrogate suspects. These limits include the suspect's rights to continually exercise his right to remain silent, his right to obtain the assistance of counsel at any stage of interrogation, and his right to a speedy hearing before a magistrate. Further, excessive pressure from the state will still result in the inadmissibility of inciminating statements. The net effect of *Mosley* still leaves the public interests in police investigative work in balance with the constitutional rights of public defendants.

Federal Court Intervention and Local Police Departments

by Lindsay Schlottman

In an action brought under 42 U.S.C. sec. 1983, the Supreme Court, led by Justice Rehnquist, reversed a federal district court's attempt to end a pattern of illegal and unconstitutional police mistreatment of citizens. *Rizzo v. Goode,* 44 LW 4095, was decided on January 21; 1976 and is the resting spot for litigation which lasted six years.

Rizzo began as two separate actions *(Goode v. Rizzo* and *COPPAR v. Tate),* each commencing in 1970, in which the principal defendants were the officials occupying the offices of Mayor, City Managing Director (who supervises and, with the Mayor's approval, appoints the Police Commissioner) and Police Commissioner (who has direct supervisory power over the police department). The two suits, permitted to proceed as class actions, alleged a pervasive pattern of illegal and unconstitutional police mistreatment, of minority citizens particularly, and of Philadelphia residents generally. The defendants were charged with conduct ranging from express authorization or encouragement of police misconduct to failure to act in a manner which would assure that such misconduct would not occur in the future.

Before the District Court for the Eastern District of Pennsylvania, forty-odd incidents of alleged police misconduct were revealed. Hearings lasted twenty-one days and two hundred and fifty witnesses testified, resulting in findings of fact which both sides accepted with respect to thirty-six incidents. (The inci-

dents are detailed in 357 F. Supp. at 1294-1316). The Supreme Court summarized the District Court's findings as follows:

The principal antagonists in the eight incidents recounted in *Goode* were Officers DeFazio and D'Amico, members of the city's "Highway Patrol" force. They were not named as parties to the action. The District Court found the conduct of these officers to be violative of the constitutional rights of the citizen complainants in three of the incidents, and further found that complaints to the police Board of Inquiry had resulted in one case in a relatively mild five-day suspension and in another case a conclusion that there was no basis for disciplinary action.

In only two of the 28 incidents recounted in COPPAR (which ranged in time from October 1969 to October 1970) did the District Court draw an explicit conclusion that the police conduct amounted to a deprivation of a federally secured right; it expressly found no police misconduct whatsoever in four of the incidents; and in one other the departmental policy complained of was subsequently changed. As to the remaining 21, the District Court did not proffer a comment on the degree of misconduct that had occurred: whether simply improvident; illegal under police regulations or state law; or actually violative of the individual's constitutional rights. *Rizzo*, supra at 4097.

After sifting through all these facts, the District Court found that although no policy to violate the legal and constitutional rights of the plaintiff classes was established, there was evidence that departmental procedure tended to discourage the filing of citizen complaints against the police and to minimize the consequences of police misconduct. Regarding the plaintiff class of Philadelphia residents, the District Court further found that although only a small percentage of police violated legal and constitutional rights of the Philadelphians, the frequency with which violations occurred was such that "they cannot be dismissed as rare, isolated instances." 357 F.Supp., at 1319.

The District Court concluded by ordering (in 1973) the defendants to draft a "comprehensive program for dealing adequately with civilian complaints" and the Court suggested guidelines such as "(1) Appropriate revision of police manuals and rules of procedure spelling out in some detail, in simple language, the 'do's and don'ts' of permissible conduct in dealing with civilians. . . (2) Revision of procedures for processing complaints against police. . . ." 357 F.Supp. at 1321.

As a result of this order, plaintiffs and defendants expanded the police department's two and one half page directive for handling complaints into a fourteen page document which reflected the revisions suggested by the District Court guidelines. This document was incorporated into the District Court's final judgment and the City Police Commissioner thereafter was required to enforce the directives contained in the document.

The defendants appealed the order and final judgment of the District Court to the U.S. Court of Appeals for the Third Circuit, claiming that the federal judiciary was intruding into the discretionary authority committed to the defendants as public officials by state and local law. In 1974, the Third Circuit upheld the District Court's findings that the police department's existing procedures for handling citizen's complaints of police misconduct were "inadequate;" further, it affirmed the District Court's choice of equitable relief, stating "The revisions were ordered because they appeared to have the potential for prevention of future police misconduct." *Goode v. Rizzo*, F.2d , (CA3, 1974), cited in *Rizzo*, supra at 4096. Petitioners appealed the affirmation of the Third Circuit Court of Appeals.

The Supreme Court, in reversing the judgment of the Third Circuit Court of Appeals, which affirmed the decree of the District Court, analyzed liability under 42 U.S.C. sec. 1983, the basis of the class actions. Section 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit inequity, or other proper proceedings for redress.

The Supreme Court stated that "The plain words of the statute impose liability — whether in the form of payment of redressive damages or being placed under an injunction — only for conduct which 'subjects or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution." *Rizzo*, supra at 4098. As far as such conduct was concern, the Supreme Court saw no causal connection between the complaints and the individual respondents. Individual police officers who were found to have violated constitutional rights were not named as party defendants; only a few of the individuals whose rights were violated were named as party plaintiffs. Also, "As the facts developed, there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners — express or otherwise — showing their authorization or approval of such misconduct." *Rizzo*, supra at 4098

The Court entertained "serious doubts" that an Article III "case or controversy" was made out. *Rizzo*, supra at 4098. In discussing *O'Sea v. Littleton*, 414 U.S. 488 (1974) and *Baker v. Carr*, 369 U.S. 186 (1962), the Supreme Court pointed out that in the *Rizzo* case the respondents' claim to "real and immediate" injury rested only upon what one of a small anonymous group of police officers might do in the future because of that officer's perception of de-

partmental disciplinary procedures. The Court stated, "insofar as the individual respondents were concerned, we think they lacked the requisite 'personal stake in the outcome,' *Baker v. Carr,* 369 U.S. 186, 204 (1962), i.e., the order overhauling police disciplinary procedures." *Rizzo,* supra at 4098.

The conclusion that no Article III "case or controversy" existed would perhaps have ended the matter, noted the Court, but the District Court's certification of the plaintiff classes bridged the gap between facts revealed at the tiral and classwide relief sought under sec. 1983. The Supreme Court, however disagreed with the District Court's holding that a section 1983 action was made out based on the showing of an "unacceptably high" number of incidents of police misconduct, there being shown twenty incidents in a city of three million people and seventy five hundred police officers. *Hague v. CIO,* 307 U.S. 496 (1939), *Allee v. Medrano,* 416 U.S. 802 (1974), and *Lankford v. Gelston,* 364 F.2d 197 (CA4, 1966) were distinguished from *Rizzo.* In *Hague,* there existed deliberate policies of public officials, implemented by force and violence, to deprive plaintiffs of constitutional rights. In *Medrano,* "a single plan" and "a pervasive pattern of intimidation" by public officials which resulted in suppression of constitutional rights were revealed. *Medrano,* supra at 812. In *Lankford,* a plan conceived by public officials was implemented which resulted in the flagrant deprivation of constitutional rights of citizens. The Supreme Court decided that the facts in *Rizzo* showed no plan or pattern by public officials to deprive plaintiff class members of their constitutional rights; further, the Court found untenable the District Court's conclusion "that even without a showing of direct responsibility for the actions of a small percentage of the police force, petitioners' *failure* to act in the face of a statistical pattern" was enjoinable under sec. 1983. *Rizzo,* supra at 4099. The Court concluded that "Under the well-established rule that federal 'judicial powers may be exercised only on the basis of a constitutional violation,' *Swan v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 16 (1971), this case presented no occasion for the District Court to grant equitable relief against the petitioners." *Rizzo,* supra at 4100.

Principles of federalism were also discussed by the Court as it rendered its decision. The Supreme Court, noting that the District Court's order and judgment sharply limited the police department's handling of its internal affairs, decided that the District Court departed from the duty of the federal courts to be "constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law.' " *Stenfanelli v. Minard,* 342 U.S. 117,120 (1951), quited in *O'Shea v. Littleton,* supra at 500.