

Miranda Update

Fifth Amendment Protection and Break in Custody

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Because of the great value a statement obtained from a defendant has in a criminal prosecution, the government will invariably face a challenge to its admissibility. The most recognized challenge, to both law enforcement and the public at large, is an alleged violation of the Fifth Amendment protection adopted by the U.S. Supreme Court in *Miranda v. Arizona*.¹ While this challenge is well-known and over four decades old, its precise contours still are being established. Over

the years, the Supreme Court has decided cases in which it reexamined the applicability and scope of *Miranda*. Now is one of those times. The purpose of this article is to discuss the recent decision of *Maryland v. Shatzer*,² where the Supreme Court ruled upon the legal significance and definition of a break in custody in terms of the Fifth Amendment privilege against compelled self-incrimination (*Miranda*). Law enforcement officers must have an understanding of this decision

and its holding given its impact on their ability to engage in interrogation during various stages of a criminal investigation.

Prior Relevant Case Law

To best understand the significance of *Maryland v. Shatzer*, it is important to provide a brief overview of previous Fifth Amendment case law. In *Miranda v. Arizona*,³ the Supreme Court created a set of measures to protect a defendant's Fifth Amendment

privilege against compelled self-incrimination by requiring law enforcement officers to provide certain warnings and obtain a waiver from a defendant prior to custodial interrogation.⁴ The rationale behind the *Miranda* rule is to protect a defendant from the “inherently compelling pressures”⁵ and the “police-dominated atmosphere”⁶ of custodial interrogation. In *Miranda*, the Court created two basic prophylactic measures to protect a defendant’s Fifth Amendment rights: the right to silence and the right to counsel.⁷ When law enforcement provides the warnings required by *Miranda*, a defendant may relinquish these rights through a knowing, intelligent, and voluntary waiver or may invoke one or both of the rights.⁸

In subsequent cases, the Supreme Court has ruled that once a defendant invokes the Fifth Amendment right to counsel,⁹ any current interrogation must cease and the defendant may not be subjected to further police-initiated custodial interrogation unless counsel is present.¹⁰ This second layer of protection, often referred to as the *Edwards*¹¹ rule, creates a presumption that once a suspect invokes the Fifth Amendment right to counsel, any waiver of that right in response to a subsequent police-initiated attempt at custodial interrogation is involuntary.¹² The rationale

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behind the *Edwards* rule is that after the invocation of the right to counsel, “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.”¹³

It also must be remembered that this two-layered Fifth Amendment protection in *Miranda* and *Edwards* is not crime specific. Once a defendant invokes the Fifth Amendment right to counsel for one offense, the defendant may not be subjected to police-initiated interrogation regarding any offense while remaining in custody unless counsel is present.¹⁴

To date, lower courts uniformly have held that the *Edwards* protection ends with a break in custody.¹⁵ While not specifically ruling on the issue, the Supreme Court in *McNeil*

*v. Wisconsin*¹⁶ used language (in dicta) indicating that the *Edwards* protection applies “assuming there is no break in custody.”¹⁷ In *Maryland v. Shatzer*,¹⁸ the Supreme Court expressly ruled on this issue. In addition, in this case, the Court also addressed the impact of incarceration following a conviction—as opposed to pretrial custody—on the break-in-custody analysis. In other words, the Court decided whether a defendant who is serving time in a prison setting is deemed in continuous custody as some lower courts have ruled.¹⁹

Case Circumstances

Michael Shatzer, Sr., was incarcerated at a Maryland correctional facility while serving a sentence for a child-sexual-abuse offense. In August 2003, a police detective attempted to interview Shatzer at the correctional facility on allegations

that he had sexually abused his 3-year-old son (a charge unrelated to the crime for which he was incarcerated). The detective advised Shatzer of his rights and Shatzer, apparently thinking that the detective was an attorney who was there to discuss the crimes for which he was incarcerated, initially waived his rights. After learning of the true purpose of the interview, Shatzer declined to be interviewed without an attorney. Accordingly, the detective ended the attempted interview and returned Shatzer to the general prison population.

In March 2006 (approximately 2 1/2 years later and after developing new evidence against Shatzer), a different police detective from the same department and a social worker went to a second Maryland correctional facility (where Shatzer had been transferred) to interview Shatzer about the sexual abuse of Shatzer's son. This time, Shatzer waived his rights in writing. During subsequent interviews and a polygraph examination, he made various incriminating statements. At the end of the last interrogation, Shatzer requested an attorney and the interrogation ended.²⁰

Lower Court Proceedings

After being charged with various child-sexual-abuse offenses, Shatzer moved to suppress the statements made

in March 2006, on the grounds that they violated the *Edwards* rule. The trial court denied the motion, reasoning that Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations.²¹ Shatzer was found guilty following a bench trial.²²



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The Court of Appeals of Maryland reversed and remanded the trial court's decision. The court of appeals held that the passage of time alone did not end the protection afforded by *Edwards* and that even if the *Edwards* protection ends with a break in custody, Shatzer's release back to the general prison population did not constitute a break in custody.²³

Supreme Court Opinion

The Supreme Court granted certiorari and announced its decision in February to resolve the uncertainty that existed with respect to the definition and

impact of a break in custody in the *Miranda-Edwards* analysis.²⁴ The Supreme Court did not accept the premise that the *Edwards* protection automatically terminates with a break in custody. Instead, the Court held that this protection prohibiting law enforcement from attempting to interview a subject who has previously invoked his *Miranda* right to counsel continues for 14 days from the period of release from custody.²⁵ According to the majority, 14 days gives "plenty of time for the suspect to get reacquainted to his normal life, consult with friends and counsel, and shake off any residual coercive effects of prior custody."²⁶ After this 2-week period, the *Edwards* protection no longer applies.

In deciding how long to extend the *Edwards* rule, the Court did a cost-benefits analysis.²⁷ In starting with the benefits of the rule, the Court reasoned that the *Edwards* rule helps conserve judicial resources, "which would otherwise be expended in making difficult determinations of voluntariness."²⁸ However, the main purpose of the *Edwards* rule is to preserve the "integrity of an accused's choice to communicate to police only through counsel"²⁹ by "preventing police from badgering a defendant into waiving his previously asserted *Miranda* rights."³⁰ Accordingly, the Court reasoned that the "benefits of the rule are

measured by the number of coerced confessions it suppresses that otherwise would have been admitted.”³¹

The Court found it easy to see the possibility of police badgering of a defendant who previously invoked the right to counsel and remained in uninterrupted pretrial custody, reasoning that the defendant remains in an “unfamiliar,” “police-dominated atmosphere.”³² However, once a defendant is released from custody, the defendant is no longer isolated; can meet with family, friends, and counsel; and is less likely to be coerced by police into waiving his or her rights.³³ Accordingly, with a break in custody there are fewer benefits for extending the *Edwards* rule. Additionally, there are increased costs in the exclusion of otherwise voluntary statements and the deterrence effect on law enforcement for even attempting to obtain such confessions.³⁴

As a result of this cost-benefits analysis, the Court concluded that the “only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects.”³⁵ The Court was not inclined to make the *Edwards* rule eternal because the rule is broad enough to cover different crimes,³⁶ interrogations by different departments,³⁷ and attempted interrogations after the defendant has met with an

attorney.³⁸ Moreover, if the *Edwards* protection expires, a defendant still may be protected by the provisions of *Miranda*, assuming it is a custodial interrogation situation.³⁹

The Court declared its desire to create a clear rule for law enforcement as to when renewed interrogation is lawful and decided that the appropriate time period is after 14 days from release of custody.⁴⁰ The 14-day rule gives the defendant a chance to “shake off any



residual coercive effects of his prior custody”⁴¹ and seek any desired guidance from friends, family, and counsel. Any statements obtained by police after this 14-day period are unlikely to be compelled.⁴² Furthermore, the courts will have an easy time in deciding if the subsequent confession was obtained outside this 14-day window.⁴³ Why the Court chose 14 days as the cutoff point for the

termination of *Edwards* protection is unclear, other than its apparent view that it takes that long to eliminate the coercive effect of custody.⁴⁴

Break in Custody?

After announcing the 14-day rule, the Court had to decide whether there was a break in custody for *Miranda* purposes when police terminated the initial interrogation of Shatzer and released him back to the general prison population. Prior to this case, the Court had not ruled on whether incarceration constitutes custody for *Miranda* purposes.⁴⁵

To answer this question, the Court emphasized that it depends on whether incarceration “exerts the coercive pressure that *Miranda* was designed to guard against—the ‘danger of coercion [that] results from the interaction of custody and official interrogation.’”⁴⁶ The Court distinguished between pretrial detention, where coercive pressures are present, and posttrial incarceration. For example, the defendant may be focused on the impact that cooperation with law enforcement may have on a pending prosecution as opposed to posttrial incarceration. The Court explained that to define custody for *Miranda* purposes, officers must go beyond the traditional freedom-of-movement test and examine whether the situation is one where the

coercive pressures identified in *Miranda* exist.⁴⁷ The Court recognized that there often are harsh conditions associated with incarceration but that these conditions are the result of the prison sentence and not due to coercive pressure of law enforcement as a result of the defendant's "unwillingness to cooperate in an investigation."⁴⁸ Moreover, once convicted and sentenced, a defendant lives in prison, gets accustomed to the surroundings and daily routine, and regains some degree of control over his or her life, including the ability to interact with other inmates, guards, workers, visitors, and have mail or telephonic contact with the outside world.⁴⁹ In summary, the Court distinguished incarceration from interrogative custody associated with *Miranda*.⁵⁰

Based on the above, the Court found that there was a break in custody following the initial interrogation, when the detective terminated the attempted interrogation and Shatzer was returned to the general prison population.⁵¹ Because the break in custody was over 14 days (approximately 2½ years in this situation), *Edwards* does not require suppression of Shatzer's statements. Therefore, the Supreme Court reversed the decision of the Court of Appeals of Maryland and remanded the case for further proceedings.⁵²

Conclusion

The principles from this decision are significant in traditional Fifth Amendment analysis and both answer and raise questions of vital importance to law enforcement. On the one hand, the Court has announced a bright-line 14-day break-in-custody rule that is helpful to law enforcement in assessing whether further attempts to interrogate can occur. If law

// ...law enforcement must assess whether the individual is in custody for *Miranda* purposes under the new circumstances to determine if advice of rights are necessary.

// enforcement attempts to interrogate an incarcerated individual and, after being provided advice of rights, the individual invokes the Fifth Amendment right to counsel, the attempted interrogation must cease. However, law enforcement may reapproach this individual after 14 days from the time the person is returned to the general prison population in an attempt

to interrogate the individual on the same or a different offense. Therefore, as a result of this decision, it is clear that a prisoner's *Edwards* protection does not last forever but expires 14 days after being returned to the general prison population as this is considered a break in custody.

In terms of dealing with incarcerated prisoners, it is unclear if law enforcement is required to provide a prisoner his advice of rights prior to any attempted interrogation. In this decision, the Court discusses the concept of interrogative custody and distinguishes it from everyday incarceration.⁵³ This implies that when a prisoner is removed from the general prison population and confronted by law enforcement for questioning, the prisoner is in interrogative custody for *Miranda* purposes and the required warnings should be provided before any attempted interrogation. However, it is unclear if this is true in every attempted prison interrogation context.

As to the situations outside prison incarceration, there are several possible scenarios that law enforcement may encounter. If the defendant remains in continuous pretrial custody after previously invoking his Fifth Amendment right to counsel, the *Edwards* rule prohibits law enforcement from initiating contact with the subject about any criminal activity unless

counsel is present. If the defendant is released from custody after previously invoking the Fifth Amendment right to counsel, law enforcement may initiate contact with the defendant in an attempt to interrogate following a 14-day waiting period. However, in this situation officers must consider whether other possible legal obstacles exist, such as the attachment of the Sixth Amendment right to counsel and the legal consequences thereto.⁵⁴ Moreover, law enforcement must assess whether the individual is in custody for *Miranda* purposes under the new circumstances to determine if advice of rights are necessary.

Finally, if there is a break in custody but a subject still is within the 14-day window, it is clear that the individual may not be reapproached by law enforcement about the same crime until the 14 days have lapsed. However, the Fifth Amendment right to counsel is not crime specific. Therefore, it appears from the holding of this decision that an individual who has been released from custody on one charge and arrested on another charge during the 14-day window may not be interrogated by law enforcement prior to the expiration of the 14-day period. If true, this creates a substantial obstacle to conducting postarrest interviews and raises a legitimate question as

to how police will know that an individual is within this 14-day protective bubble. The answers to these questions are unclear and will be determined only through future litigation. ♦

Endnotes

- ¹ 384 U.S. 436, 86 S. Ct. 1602 (1966).
- ² 559 U.S. ____ (2010).
- ³ 384 U.S. 436, 86 S. Ct. 1602 (1966).
- ⁴ *Id.* at 478-479.
- ⁵ *Id.* at 467.
- ⁶ *Id.* at 445. See also *Illinois v. Perkins*, 496 U.S. 292, 110 S. Ct. 2394 (1990).
- ⁷ *Id.* at 468-472; 478-479.
- ⁸ *Id.*
- ⁹ The Fifth Amendment right to counsel must be distinguished from the Sixth Amendment right to counsel. For an overview of the attachment and critical stages of the Sixth Amendment right to counsel, see Kenneth A. Myers, "Avoiding Sixth Amendment Suppression: An Overview and Update," *FBI Law Enforcement Bulletin*, March 2009. See also *Montejo v. Louisiana*, ____ U.S. ____, 129 S. Ct. 2079 (2009) for the current law as to the legal significance of invoking the Sixth Amendment right to counsel.
- ¹⁰ *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981); *Minnick v. Mississippi*, 498 U.S. 146, 111 S. Ct. 486 (1990).
- ¹¹ *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880 (1981).
- ¹² *Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093 (1988).
- ¹³ *Id.* at 681.
- ¹⁴ *Id.*
- ¹⁵ See *United States v. Harris*, 221 F.3d 1048 (8th Cir. 2000); *People v. Storm*, 28 Cal. 4th 1007, 1023-1024, and n. 6, 52 P.3d 52, 61-62, and n. 6 (2002).
- ¹⁶ 501 U.S. 171, 111 S. Ct. 2204 (1991).
- ¹⁷ *Id.* at 177.
- ¹⁸ 559 U.S. ____ (2010).
- ¹⁹ See *United States v. Arrington*, 215 F.3d 855 (8th Cir. 2000) (defendant not "in custody" for purposes of *Miranda*

once defendant has pleaded guilty and was transferred from police custody to correctional custody to serve his sentence); *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002) (*Edwards* does not apply to a defendant that has been convicted and who remains in custody only in the sense that he is incarcerated in the general prison population). But, see *Kochutin v. State*, 813 P.2d 298, 304 (Alaska App. 1991) ("we find nothing in *Edwards* or in subsequent decisions of the Supreme Court to indicate that *Edwards* should be relaxed by the mere passage of time. Nor are we persuaded that [the defendant's] status as a sentenced prisoner removed his case from coverage of the *Edwards* rule"); *United States v. Green*, 592 A.2d 985 (D.C. App. 1991).

²⁰ 559 U.S. ____ (2010), No. 08-860, slip op. at 1-3.

²¹ *Id.* at ____, No. 08-860, slip op. at 4; No. 21-K-06-37799 (Cir. Ct. Washington Cty., Md., Sept. 14, 2006), App. 55.

²² *Id.* at ____, No. 08-860, slip op. at 4; No. 21-K-06-37799 (Cir. Ct. Washington Cty., Md., Sept. 21, 2006).

²³ *Id.* at ____, No. 08-860, slip op. at 4, *Shatzer v. State*, 405 Md. 585, 954 A.2d 1118 (2008).

²⁴ 559 U.S. ____ (2010); Scalia, J., delivered the opinion of the Court in which Roberts, C.J., and Kennedy, Ginsburg, Breyer, Alito, and Sotomayor, J.J., joined, and in which Thomas, J., joined as to part III. Thomas, J., filed an opinion concurring in part and concurring in the judgment. Stevens, J., filed an opinion concurring in the judgment.

²⁵ 559 U.S. ____ (2010); No. 08-860, slip op. at 11.

²⁶ *Id.*

²⁷ *Id.* at ____, No. 08-860, slip op. at 6-9.

²⁸ *Id.* at ____, No. 08-860, slip op. at 6-7, quoting *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990).

²⁹ *Id.* at ____, No. 08-860, slip op. at 7, quoting *Patterson v. Illinois*, 487 U.S. 285, 291 (1988).

³⁰ *Id.*, quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).