

Maryland v. Shatzer:
Ernesto Miranda and the Fortnight Rule
Legal Question of the Week
Vol. 3, Number 4
February 26, 2010

Brian Beasley
Student of History and Legal Adviser, HPPD

His name was Ernesto Miranda. Born in Arizona in 1941, he dropped out of school in the eighth grade after being convicted of his first crime. After going in and out of reform school he joined the army but was dishonorably discharged after 15 months for many AWOL charges and charges for spying on other people's sexual activities.

In the early 1960's, Miranda lived in Phoenix, Arizona¹ where the Phoenix police report that he repeatedly abducted, kidnapped, raped and robbed young women. For whatever reason, Miranda generally kidnapped his victims on the corner of 7th and Missouri Avenue² so it is not surprising that he was eventually identified by a relative of one of his victims who saw him at that intersection.

After his arrest and two hours of interrogation, Miranda confessed to the crimes of rape and kidnapping. He was then taken to meet the rape victim for positive voice identification. When Miranda was asked by the police in the victim's presence whether this was the victim, he said, "That's the girl."³ The victim identified his voice as the voice of her assailant. Miranda was later convicted of rape and kidnapping and sentenced to 20 to 30 years on both charges. Now you know what the case is, in a minute, you're going to hear . . . the rest of the story.⁴

Miranda appealed his conviction all the way to the U.S. Supreme Court and the Court's ruling in Miranda v. Arizona⁵ changed the way police officers conducted interrogations and gave birth to the well-known "Miranda rights." The Court overturned

¹ According to the Phoenix Convention & Visitors Bureau, it is the fifth largest city in the U.S. and home to more than 200 golf courses. Legend has it that Phoenix got its name from Cambridge-educated pioneer Darrell Duppa, who saw the ruins and prehistoric canals of the Hohokam Indian tribe and believed another civilization would rise from the ashes. Ernesto Miranda is not mentioned on the Phoenix Convention & Visitors Bureau webpage.

² Remember – it's harder to catch the smart ones.

³ See footnote 2 above.

⁴ For those old enough to remember Paul Harvey's radio show, he would start out by saying "Hello Americans, I'm Paul Harvey. You know what the news is, in a minute, you're going to hear ... the rest of the story." I can remember listening to this on an AM only radio in my father's Plymouth Scamp. No FM radio, no 8-track or cassette deck, and you had to turn the knob with the dexterity of a surgeon to find the station and get it just right for the best signal. But I digress...

⁵ 384 U.S. 436 (1966).

Miranda's convictions and held that because the "inherently compelling pressures" of custodial interrogation by police officers might compel a person to incriminate himself involuntarily in violation of the Fifth Amendment,⁶ it was necessary to establish procedural safeguards to protect against this. Therefore, the Court decided that any statement given during custodial interrogation is not admissible unless officers warn the suspect:

1. That he has the right to remain silent;
2. That anything he says can be used against him in a court of law;
3. That he has the right to the presence of an attorney; and
4. That if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

The suspect must then voluntarily and knowingly waive these rights or have a lawyer present before giving his statement.

Even though Miranda was decided in 1966,⁷ the Supreme Court still has to interpret its meaning as new cases with different facts arise. In fact, just this past week the Court issued two new rulings dealing with Miranda issues.

The first was Florida v. Powell,⁸ where the issue was whether the rights that were given to the defendant were sufficient under Miranda. In this case, Kevin Powell was arrested by Tampa police and charged with possession of a weapon by a prohibited possessor in violation of Florida state law. Prior to asking Powell questions about the case, the officers read Powell the standard "Tampa Police Department Consent and Release Form" which stated:

"You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview."

Despite the defendant's argument that these warnings were unclear and specifically failed to inform him clearly that he had the right to the presence of an attorney during the questioning (see #3 above), the Court ruled that verbatim recitation of the Miranda warnings is not required. What is required is that the essential information

⁶ "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; **nor shall be compelled in any criminal case to be a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (emphasis added)

⁷ 1966 also saw the release of "Pet Sounds" by the Beach Boys and the Doors self-titled debut album, the premiere of "Star Trek" and the television version of "How the Grinch Stole Christmas," the first World Series Championship for the Baltimore Orioles, and the election of Ronald Reagan as Governor of California.

⁸ 08-1175, 2010 U.S. LEXIS 1898 (2010).

of the four warnings be conveyed to the defendant. The Court held that the Tampa warning clearly conveyed those four warnings and upheld Powell's conviction.

I mention the Powell case only briefly here because you will only have to worry about its ruling if you are careless about how you give the Miranda warnings and don't follow the standard High Point Police Department rights form which appears as an appendix to this article. I can't imagine that you would ever be so foolish as to decide not to use this form prior to a custodial interrogation and thereby put the admissibility of whatever statement you get at risk of being suppressed.⁹

The other case from the U.S. Supreme Court this week dealing with Miranda is Maryland v. Shatzer.¹⁰ In 2003, the Hagerstown (Maryland) Police Department was investigating allegations that Michael Shatzer had sexually abused his 3-year-old son. Mr. Shatzer was currently serving a sentence in Maryland prison for an unrelated child sexual abuse offense. When a detective went to interview Shatzer in prison and advised him of his rights, Shatzer invoked his right to have an attorney present for questioning and the interview ended.

In 2006, the police reopened the case after the victim, now eight years old, gave more specific details about the incident. Another detective went to interview Shatzer, who was still in prison, and this time Shatzer waived his rights and was interviewed for about thirty minutes, denying most of the allegations. At the end of the interview, the detective asked Shatzer if he would submit to a polygraph examination. He agreed and five days later was advised again of his Miranda rights, waived them, and took the polygraph. Upon being told that he had failed the polygraph, Shatzer made some incriminating statements.

Shatzer was convicted and eventually the case reached the U.S. Supreme Court. Shatzer's argument was that after he had invoked his right to counsel in the 2003 interview, the police were not permitted to re-approach him for a second interview in 2006 unless an attorney was present or the defendant had been the one to reinitiate contact under the Court's ruling in another Miranda case, Edwards v. Arizona.¹¹

By way of review, the Edwards case considered the issue of when officers may resume questioning after a defendant had asserted the right to counsel under Miranda. The Court ruled that once a defendant has asserted the right to counsel, officers may not question the defendant until a lawyer is made available to the defendant or until the defendant "initiates further communication, exchanges, or conversations" with an

⁹ For those officers from other agencies that read this, I am quite sure that your agency has a standard rights form that they use. I would imagine that it is much clearer than the one used by the Tampa, Florida police department. I am also confident that you take care before a custodial interrogation to clearly advise the defendant of his or her rights. Contact your own agency's legal advisor if you have questions or concerns about this.

¹⁰

¹¹ 451 U.S. 477 (1981). I don't know why Arizona features so prominently in our country's Fifth Amendment jurisprudence. Guess every state needs something to be known for. Well, something other than the Grand Canyon, I mean.

officer.¹² This rule was designed to prevent police from taking advantage of the “mounting coercive pressures of prolonged police custody by repeatedly attempting to question a suspect who previously requested counsel until the suspect is badgered into submission.” As a result, any statement obtained in violation of the Edwards rule was presumed to be involuntary and therefore inadmissible.

After the Edwards decision, lower courts consistently held that once there was a break in continuous custody, the Edwards situation ended and officers could re-approach a suspect to seek a Miranda waiver and interrogate. However, the Supreme Court had never addressed this question until the Shatzer case. In Shatzer, the Court ruled on three questions.

First, they agreed with lower courts that the Edwards presumption should end when there is a break in custody. When the suspect has been released from his pretrial custody and returned to his normal life for some time, the Court reasoned that any later decision to speak to law enforcement would be more likely attributed to his belief (right or wrong) that cooperating is in his best interest. After all, he now has had the opportunity to seek advice from family, friends, and an attorney if desired, and knows from his earlier experience both that interrogation will cease if he demands counsel and that investigative custody doesn’t last forever.

Second, the Court considered how long of a break in custody was required before officers could re-approach the suspect.¹³ Wanting to establish a bright-line rule for police officers, the Court (somewhat out of the blue) decided that the break in custody must be at least 14 days long.¹⁴ According to the Court, a fortnight¹⁵ would give the suspect plenty of time to “get reacquainted to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”¹⁶ So the rule after Shatzer is this:

After the defendant has invoked his right to counsel during custodial interrogation, he may not be re-approached by officers for custodial interrogation on any crime unless the suspect reinitiates contact with law enforcement or there has been a break in custody for at least 14 days.

¹² There is a different rule if the defendant only invokes his right to remain silent and not his right to have counsel. In those cases, officer’s may resume questioning at a later time so long as they “scrupulously honor” the right to remain silent. Michigan v. Mosley, 423 U.S. 96 (1975). I could discuss this in more detail here, but this “legal update” would quickly turn into a “legal treatise” and let’s face it – these things are long enough already.

¹³ Most lower courts had never specified that a certain amount of time had to pass, only that a break in custody had to occur. See, e.g. State v. Warren, 348 N.C. 80 (1998), a High Point murder case.

¹⁴ There’s no indication that the length of the Winter Olympics (also 14 days) had anything to do with this decision, but the timing is somewhat suspicious.

¹⁵ The Court never uses the word “fortnight” in its opinion, which is a little disappointing. Calling this “the fortnight rule” instead of “the 14-day rule” or “the 2 week rule” adds a lot more *gravitas* in my opinion. I’m hoping “The Fortnight Rule” will catch on, much like “Schmerbering the defendant,” the “Peek-a-boo Search,” and the “Columbo method” from prior updates.

¹⁶ This is also long enough to catch six episodes of American Idol, so there you go.

But the Court also had to consider whether there had been such a break in custody in the Shatzer case. You will remember that Shatzer had been in prison on an unrelated conviction from before the 2003 attempted interrogation until after the 2006 interrogation. Nevertheless, even though Shatzer had not been released from confinement in that time period, the Court ruled that his return to the general prison population after the 2003 interrogation was a break in “Miranda custody” sufficient to end the Edwards presumption. The Court pointed out that as a convicted criminal serving a prison sentence, Shatzer had returned to his “accustomed surroundings and daily routine.” Further, his detention in prison was relatively disconnected from any unwillingness to cooperate in the 2003 interrogation and so the “inherently compelling pressures” of custodial interrogation ended when he returned to his normal life in prison.

Therefore, since this “break in Miranda custody” was longer than 14 days (to say the least), the Edwards rule had ceased to apply even though Shatzer was not released from prison in the interim. Therefore, his 2006 interrogation was lawful, his incriminating statements were admissible, and his conviction was upheld.

. . . and now, the rest of the story. . .

After Miranda v. Arizona overturned his conviction and suppressed his confession, Ernesto Miranda was tried again without the statement being admitted into evidence. He was convicted again and paroled in 1972 after serving 11 years in prison. After his release, he started selling autographed Miranda Warning cards for \$1.50. In and out of jail a few more times, Ernesto Miranda was stabbed with a lettuce knife in a bar fight on January 31, 1976 and killed. A suspect was arrested, but he chose to exercise his right to remain silent after being read his Miranda rights. The suspect was released, and no one was ever charged with the murder.

Good day.

Brian T. Beasley

Police Attorney

High Point Police Department

HIGH POINT POLICE DEPARTMENT

STATEMENT OF RIGHTS AND WAIVER FOR PERSONS AGE 16 YEARS AND OVER

STATEMENT OF RIGHTS:

1. You have the right to remain silent.
2. Anything you say can and will be used against you in a court of law.
3. You have the right to talk to a lawyer and to have him present with you while you are being questioned.
4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish.
5. You can decide now or at any subsequent time to exercise these rights and not answer any questions or make any statement.
6. You have the right to have a parent, guardian or custodian present during questioning. *16 & 17 year old defendants ONLY*

WAIVER OF RIGHTS:

I have read the above statement of my rights and have also had my rights explained to me by a police officer. I understand each of these rights, and having these rights in mind I waive them and willingly agree to answer questions without the presence of counsel. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

SIGNED _____

ADDRESS _____

DATE OF BIRTH _____

SS # _____

PHONE NUMBER _____

INTERVIEWING OFFICER _____

WITNESS _____

DATE _____ 19____ TIME _____