

New Developments

Criminal Law

*Maryland v. Shatzer*¹: Fourteen-Day Limitation on the Edwards Bar

The defendant had been incarcerated after being convicted for an unrelated offense when police detectives attempted to question him in 2003 for sexually abusing his son. Shatzer invoked his *Miranda*² rights and the detectives returned him to the general population of the prison holding him. Almost three years later, the police discovered new evidence that Shatzer had sexually abused his son. The defendant was still incarcerated for the same unrelated offense. When police detectives questioned him this time, he waived his *Miranda* rights and made several admissions. Five days later, he again waived his *Miranda* rights and submitted to a polygraph. Shatzer failed this polygraph, broke down, and made several confessions before finally invoking his *Miranda* right to counsel.

*Edwards v. Arizona*³ held that after an accused has invoked his right to counsel, any waiver of that right is invalid until counsel has been made available, the accused has been released from custody, or the accused initiates further communications with the police. The main issue before the court was whether or not the “*Edwards* bar” had a temporal time limit. In this case, Shatzer had invoked his right to counsel almost three years before he finally waived his rights and made admissions and confessions to the police. During that time, he had been continuously incarcerated for an unrelated offense. The secondary issue before the court was whether or not post-conviction incarceration counted as custody for *Miranda-Edwards* purposes.

On the first issue, Justice Scalia, writing for a 7-2 court,⁴ held that the “logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects.”⁵ The court stated that to hold otherwise would “prevent[] questioning *ex ante* . . . render invalid *ex post*, confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any

jurisdiction.”⁶ The court held that the temporal end of the *Edwards* bar is fourteen days, which “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”⁷

As to the second issue, the court held that incarceration imposed “upon conviction of a crime does not create the coercive pressures identified in *Miranda*.”⁸ As a result, even though Shatzer had been in continuous “custody” since he invoked his *Miranda* right to counsel, this custody was held not to be the same as *Miranda* custody. The court noted that, in addition to the absence of a coercive atmosphere, the interrogator had “no power to increase the duration of incarceration, which was determined at sentencing.”⁹ The court held that the *Edwards* bar did not apply to Shatzer’s statements.

While the specific facts of this case may not occur frequently in the military setting, there are several practice pointers for military attorneys. First, military practitioners have the added clarity of several Court of Appeals for the Armed Forces (CAAF) opinions issued prior to this opinion. *United States v. Schake* held that a six-day break in custody was enough for the *Edwards* protection to dissolve when the accused had a real opportunity to seek legal advice.¹⁰ *United States v. Young* held that a two-day break in custody was sufficient to dissolve the *Edwards* protection because the accused had an opportunity to speak to his family and friends.¹¹ Even further, the Army Court of Criminal Appeals has held that a twenty-hour release from custody was sufficient to overcome the *Edwards* barrier when the accused had the opportunity to consult with counsel during that twenty-hour break.¹² Second, the *Shatzer* decision seems to take these opinions even further. A fourteen-day break is sufficient to dissolve the *Edwards* protection, even in the absence of evidence that the accused had the opportunity to consult with counsel.¹³ Reading these

¹ No. 08-680, 2010 WL 624042 (Feb. 24, 2010).

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ 451 U.S. 477 (1981).

⁴ He was joined by C.J. Roberts, J. Kennedy, J. Ginsburg, J. Breyer, J. Alito, and J. Sotomayor. Justice Thomas joined the main opinion as to Part III and filed a separate opinion concurring in the judgment and concurring in part. Justice Stevens filed a separate opinion concurring in the judgment.

⁵ *Shatzer*, 2010 WL 624042, at *7.

⁶ *Id.* at *7.

⁷ *Id.* at *8.

⁸ *Id.* at *9.

⁹ *Id.* at *10.

¹⁰ 30 M.J. 314 (C.M.A. 1990).

¹¹ 49 M.J. 265 (C.A.A.F. 1998).

¹² *United States v. Mosely*, 52 M.J. 679 (A. Ct. Crim. App. 2000).

¹³ In fact, there were probably very few opportunities for Shatzer to consult with counsel while incarcerated, but the Court did not focus on this at all. As stated previously, the Court was concerned with whether the coercive effects of the prior custodial interrogation had worn off. See *supra* note 6 and accompanying text.

opinions together, they can co-exist depending on the circumstances. In situations where counsel is readily available, the twenty-hour *Mosely* standard would appear to suffice to dissolve the *Edwards* bar. In situations where counsel is not readily available, the *Shatzer* fourteen-day standard would appear to suffice. —MAJ Andrew D. Flor

*Florida v. Powell*¹⁴: The Further Erosion of *Miranda* Rights

Powell was arrested on weapons charges. Tampa police read him his *Miranda* rights from their standard form. The relevant portion stated, “You have the right to talk to a lawyer before answering any of our questions” and “You have the right to use any of these rights at any time you want during this interview.”¹⁵ At no point did the form specifically advise Powell that he could have an attorney present during questioning.

Miranda did not specify the exact language to be used when advising suspects of their rights. The format is irrelevant as long as the suspect is warned “[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.”¹⁶ The third warning was at issue in *Powell*.

Justice Ginsburg, writing for a 7-2 court,¹⁷ held that the warnings given must “reasonably convey to a suspect his rights as required by *Miranda*.”¹⁸ The warnings in this case sufficed. The “two warnings reasonably conveyed Powell’s right to have an attorney present, not only at the outset of interrogation, but at all times.”¹⁹ The court stated that this holding will not lead to gamesmanship by law enforcement because it is in law enforcement’s best interest to make sure that their warnings are absolutely clear. The court stated that the FBI warnings are a model to follow, but that the court will not mandate specific language.²⁰

Army practitioners have little to worry about with this case. Department of the Army (DA) Form 3881, Rights Warning Procedure/Waiver Certificate, states in relevant part, “I have the right to talk privately to a lawyer before, during, and after questioning and to have a lawyer present with me during questioning.”²¹ This wording clearly complies with the intent behind *Miranda* and would pass Supreme Court scrutiny, particularly in light of *Powell*. Arguably, DA Form 3881 is even clearer than the FBI warnings because it states plainly that the right to speak to an attorney is not just applicable before and during questioning, but also afterward. In addition, DA Form 3881 explicitly provides the right to have an attorney present during questioning. —MAJ Andrew D. Flor

Administrative & Civil Law

In accordance with AR 27-3, commanders must ensure that Soldiers have access to preventive law services. The servicing Office of the Staff Judge Advocate is responsible for developing and delivering these services. Inevitably, the commander, the staff judge advocate, and others will have questions about the focus of the preventive law program. When questions do arise, where can duty-conscious Chiefs of Legal Assistance turn for assistance? The Federal Trade Commission (FTC) website is a great place to start.²² As part of its mission to protect America’s consumers, the FTC has developed a website that provides a wealth of information on issues such as identity theft, third party and creditor debt collection, and foreign money offers and counterfeit check scams. The FTC also publishes an annual report of the top consumer complaints. The 2009 report, published on 24 February 2010, is available at the FTC website.²³ —MAJ Oren H. McKnelly

¹⁴ No. 08-1175, 2010 WL 605603 (Feb. 23, 2010).

¹⁵ *Id.* at *1.

¹⁶ *Id.* at *7 (quoting *Miranda v. Arizona*, 384 U.S. 436, 479 (1966)).

¹⁷ She was joined by C.J. Roberts, J. Scalia, J. Kennedy, J. Thomas, J. Alito, and J. Sotomayor. Justice Breyer joined the main opinion as to Part II. Justice Stevens filed a separate dissenting opinion, in which J. Breyer joined as to Part II.

¹⁸ *Powell*, 2010 WL 605603, at *7 (internal citations omitted).

¹⁹ *Id.* at *8.

²⁰ In relevant part, the FBI warnings state, “You have the right to talk to a lawyer for advice before we ask you any questions. You have the right to have a lawyer present during questioning.” *Id.* at *9 (internal citation omitted).

²¹ U.S. Dep’t of Army, DA Form 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1989).

²² Federal Trade Commission, <http://www.ftc.gov> (last visited Mar. 17, 2010).

²³ Federal Trade Commission, FTC Issues Report of 2009 Top Consumer Complaints (Feb. 24, 2010), <http://www.ftc.gov/opa/2010/02/2009.fraud.shtm>.