LEGAL UPDATE

City of Madison Police Department

Spring 2010 Captain Victor Wahl

Miranda

***Maryland v. Shatzer*, 130 S.Ct. 1213 (2010); Decided February 24, 2010 by the United States Supreme Court.**

The *Shatzer* case addressed the issue of when a suspect who has invoked his right to counsel may be re-interrogated. Shatzer was a suspect in a sexual abuse case. He was also incarcerated on an unrelated offense. Detectives met with Shatzer at the correctional institution where he was being held to interview him. Shatzer was informed of his *Miranda* rights, and shortly thereafter indicated that he did not want to speak without an attorney. The detectives ended the interview, and Shatzer was returned to the general prison population.

The case remained open. Two years later additional information about the incident came to light, and a new detective was assigned to investigate. The detective subsequently returned to the correctional institution to interview Shatzer. Shatzer was read his *Miranda* rights, and waived the rights, agreeing to speak with the detective. Over the course of two interviews Shatzer made incriminating statements. He was subsequently charged and convicted of several criminal offenses. Shatzer challenged his conviction, claiming that the subsequent interviews were barred under *Miranda*.

Recall that prior to conducting a custodial interrogation, police must notify a suspect of his/her rights under *Miranda*. The suspect may waive those rights, which permits the police to continue questioning. The suspect may also invoke his/her *Miranda* rights, which requires the police to immediately terminate questioning.

Which right the suspect invokes has a direct bearing on when and if police can re-initiate questioning with the suspect. If the suspect invokes his/her right to silence, there are limited circumstances under which police can re-initiate questioning even if the suspect has remained in continuous custody. If police re-initiate questioning under these limited circumstances, the suspect must still be informed of his/her *Miranda* rights and waive those rights.

If the suspect invokes his/her right to counsel, however, police cannot re-initiate questioning with the suspect. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the court ruled that any *Miranda* waiver subsequent to police-initiated questioning under these circumstances was presumed to be involuntary. So, under *Edwards*, the only way police have been able to question an in-custody suspect who has invoked his/her right to counsel is if the suspect initiated contact with law enforcement (and then waived his/her *Miranda* rights), or if there was a break in the suspect's custody.

The primary issue in *Shatzer* was whether a break in continuous custody does, in fact, permit law enforcement to re-initiate contact with a suspect and attempt questioning. While lower courts have consistently held that any break in custody ends the presumption of involuntariness articulated in *Edwards*, the U.S. Supreme Court had never specifically ruled on the issue.

So, if a suspect in custody asks for an attorney (invoking his/her right to counsel), when are police permitted to re-initiate questioning? The *Shatzer* court stated, "The only logical endpoint of *Edwards*…is termination of *Miranda* custody and any of its lingering effects." The court went on to conclude that the 14 days is a sufficient period for a suspect to "get reacclimianted to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."

The court also concluded that "lawful imprisonment imposed upon conviction of a crime does not create" custody for *Miranda* purposes. So, when Shatzer was released back into the general prison population after the first interview attempt, it was as if he had been released from *Miranda* custody. Since 14 days passed before police re-initiated questioning (and Shatzer waived his *Miranda* rights at that point) his statements were admissible.

The *Shatzer* decision, then, provides a significant modification to the law. Previously, as soon as a suspect was released from custody he/she would have been viewed as starting with a "clean slate" with respect to *Miranda*. Now, if an in-custody suspect invokes his/her right to counsel, not only are officers prohibited from re-initiating contact while the suspect is in custody, but officers may not initiate contact with the suspect for 14 days after he/she has been released from custody.

Note that these protections are based on *Miranda*; the 6th Amendment Right to Counsel may provide additional protection once a suspect has been formally charged with a crime.

Also, note that Shatzer was only deemed to have been released from custody because he was incarcerated pursuant to a criminal conviction (and returned to the general prison population). This will **not** be the case for a suspect in jail awaiting trial…the *Miranda/Edwards* protections will continue to apply to a suspect (who has invoked his/her right

to counsel) in jail awaiting trial for as long as he/she is in continuous custody (and 14 days beyond).

The *Shatzer* court did not address a number of issues that will come up with suspects during this 14 day post-custody period. For example, if an in-custody suspect has invoked his/her right to counsel, *Miranda* and *Edwards* prohibit police from re-initiating questioning even if the subsequent interrogation attempt is about a different crime; or is conducted by different law enforcement personnel; or is in a different physical location; or even if the suspect has actually met with an attorney. Does this broad protection still apply once the suspect has been released from custody but before 14 days have passed? The answer is unclear, and future litigation will be needed to clarify the precise scope of *Shatzer*. Until courts provide this clarification, officers should assume that they cannot re-initiate questioning during this 14 day period about **any** crime that occurred prior to the suspect invoking his/her right to counsel. However, it is probably safe to question the suspect about new crimes that occurred after his/her release.

Finally, remember that the suspect can always re-initiate contact with police and make a statement (following a valid *Miranda* waiver, if the suspect is in custody).

Miranda

***Florida v. Powell*, 130 S.Ct. 1195 (2010); Decided February 23, 2010 by the United States Supreme Court.**

Powell was arrested in Tampa, Florida as part of a robbery investigation. Prior to interviewing Powell, officers advised him of his *Miranda* rights by use of a form. The form read:

> 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.

Powell waived his rights, and made several incriminating statements. He was charged with being a felon in possession of a firearm.

Powell challenged the admission of his statements, arguing that the *Miranda* warnings he had been provided were insufficient. Powell argued that the warnings did not adequately convey his right to have an attorney present during questioning. The Florida Supreme Court agreed, and ruled that Powell's statements were inadmissible.

The *Miranda* case, decided in 1966, outlined the now familiar warnings that must be provided by police prior to engaging in a custodial interrogation. *Miranda* requires that, prior to any custodial interrogation, a suspect be advised:

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

While any *Miranda* warnings must convey each of these rights, courts have avoided dictating the precise words that must be used by police. Instead, "the inquiry is simply whether the warnings reasonably 'convey to a suspect his rights as required by *Miranda*.'"

Powell's argument was that the wording of the Tampa Police Department's *Miranda* warnings, specifically "you have the right to talk to a lawyer before answering any of our questions" seemingly limited his ability to consult with an attorney to pre-questioning, and did not convey his right to have an attorney present during questioning.

The U.S. Supreme Court reversed the decision of the Florida Supreme Court, concluding that Powell had adequately been advised of his *Miranda* rights.

The *Miranda* rights cards provided by the State of Wisconsin and used by MPD officers clearly convey all of the necessary *Miranda* warnings (including the express right to have an attorney present during questioning). When advising a suspect of his/her *Miranda* rights, officers should always read the rights directly from their department-issued card.

Cell Phones

***State v. Carroll*, 778 N.W.2d 1 (2010); Decided February 3, 2010 by the Wisconsin Supreme Court.**

The *Carroll* case examined a variety of legal issues relating to cell phones. Unfortunately, the court left the most important question—whether and to what extent police can examine the digital contents of a cell phone incident to arrest—unanswered.

In *Carroll*, officers were conducting surveillance of a residence as part of an armed robbery investigation. The officers observed a vehicle leave the residence, then accelerate away after it passed them. The officers attempted to stop the vehicle, and a short chase ensued. The vehicle eventually pulled to a stop in a gas station parking lot, and the driver (Carroll) exited the vehicle rapidly holding something in his hands. The officers ordered Carroll to drop the item and handcuffed him.

The officers picked up the object, which was a cell phone. The phone had flipped open when it was dropped, and the officer observed an image on the phone's screen of Carroll apparently smoking marijuana.

Carroll was placed in the rear of the squad car, while the officer sat in front with Carroll's phone. The officer scrolled through the electronic memory of the phone, observing images of illegal drugs, firearms and U.S. currency. One photo depicted Carroll, who had been adjudicated delinquent of a felony offense while a juvenile, holding a firearm. During this time the phone rang several times. The officer answered one of the calls, pretending to be Carroll. The caller used language indicating that he was seeking to purchase cocaine from Carroll.

Two days later, the officers obtained a search warrant for the phone. Based on the examination of the phone's data, Carroll was charged with being a felon in possession of a firearm. Carroll challenged the admission of the evidence obtained pursuant to the search warrant, and the case eventually reached the Wisconsin Supreme Court.

The court first concluded that it was reasonable for the officers to order Carroll to drop the object and then to retrieve it. Carroll had led the officers on a short chase in a vehicle they had been observing in connection with an armed robbery investigation, and had exited the vehicle rapidly holding an unknown object in his hand. So, the officer's direction to drop the object and his subsequent retrieval of it were reasonable.

The court also concluded that the officer's viewing of the initial image on the phone was reasonable, as the image was in plain view. The officer then had probable cause, based on the totality of the circumstances, to seize the phone.

Next, the court analyzed the officer's decision to answer the phone when it rang. At the time the phone rang, the officer had probable cause to believe the phone was used in drug trafficking (based on the initial image the officer viewed and the officer's knowledge that such images are typically found on drug traffickers' phones). The court also concluded that exigent circumstances—if the call were not answered the opportunity to gather evidence would likely be lost—were present, justifying the officer's action (answering the phone).

The court went on to rule that there was sufficient information—primarily the initial image viewed by the officer and the content of the phone call—to justify the search warrant.

Because the court concluded that these factors supported the search warrant, they did not engage in a detailed analysis of whether the officer was permitted to examine the phone's electronic contents as a search incident to arrest. Instead, the court ruled that this action was improper, while declining to render an opinion on the search incident to arrest question:

> The State also puts forth an alternative argument that (the officer's) browsing through the image gallery was legal because it occurred while Carroll was under lawful arrest. Because the State's first argument that the intercepted phone call produced an untainted independent source is dispositive on the issues presented here, we need not reach the merits of that second argument.

So, unfortunately, the *Carroll* decision offers no real guidance on the question of whether a cell phone may be "searched" incident to arrest.

A number of cases across the county have squarely addressed this issue, with inconsistent results. Most of these cases have ruled that officers are permitted to retrieve data from a cell phone incident to arrest. Some of these decisions have also introduced exigent circumstances into the analysis (since some cell phones can be remotely erased, and incoming calls/messages may overwrite existing data). However, a few cases have taken the contrary position, and concluded that the search incident to arrest doctrine does not extend to cell phones. It is also unclear to what extent—if any—last year's *Arizona v. Gant* decision (limiting police authority to search vehicles incident to arrest) will have on other search incident to arrest scenarios, including those involving cell phones.

So, at this point, it is impossible to articulate a clear rule regarding searches of cell phones incident to arrest. However, the current state of the law suggests that examination of cell phone data (as a search incident to arrest) under these circumstances will be permissible:

- Limit searches to circumstances where it appears the phone contains evidence of the offense of arrest. So, while it is probably reasonable to believe that a phone in the possession of someone arrested for a drug offense—particularly one involving sale or trafficking—will contain evidence related to the offense, there are many offenses for which this will not be the case (traffic offenses, etc.).

- The search should be contemporaneous to the arrest. Ideally, it should take place at the location where the arrest occurs and within a short time after the arrest. The further removed (in time and location) from the arrest a search takes place, the more unlikely it is to be viewed as a valid search incident to arrest. Examining cell phone data after the arrestee has been booked is unlikely to be justified as a search incident to arrest.

- Any articulation of exigency—that the data contained in the phone might be lost—may provide additional justification for the search.

- Articulate where the phone was located; courts appear more likely to uphold searches of phones discovered on the arrestee's person than those simply within the arrestee's area of immediate control at the time of arrest.

- Search in this context means manually navigating through menus to visually examine call lists, photos, messages, etc. It does not mean a full forensic examination (which is unlikely to ever be permitted as a search incident to arrest). Results of the visual examination should be documented. If further examination through a forensic examination is desired, the phone should be seized and a search warrant obtained.

Finally, always consider asking for consent.