



## **LGIT'S ROLL CALL REPORTER SEPTEMBER 2008**

**There is Neither a "Passage of Time" nor a "Break in Custody" Exception to a Suspect's Assertion of the Right to Counsel Under the Fifth Amendment**

**QUESTION:** Is a police officer who reopens an investigation after the passage of time obligated to become familiar with police reports concerning any prior questioning of the suspect to determine if the suspect had previously invoked his right to counsel?

**ANSWER:** Yes. According to the Maryland Court of Appeals, there is neither a "passage of time" nor a "break in custody" exception to a suspect's invocation of the right to counsel during an investigation. Consequently, an officer will be held strictly liable for the failure to discover that a suspect previously had invoked the Fifth Amendment right to counsel in connection with a particular criminal investigation.

**CASE:** *Michael Blaine Shatzer v. State of Maryland*, Court of Appeals of Maryland Decided, August 26, 2008

In *Shatzer v. State*, the Maryland Court of Appeals considered whether a suspect who previously had invoked his Fifth Amendment right to counsel loses that right due to the passage of time and/or a break in custody. The facts in the case established that in August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department made a referral to the police department regarding a child. The referral involved allegations that Michael Blaine Shatzer, Sr., committed sexual child abuse by ordering his three-year old son to perform fellatio on him. On August 7, Detective Shane Blankenship met with Shatzer to interview him about the allegations at the Maryland Correctional Institution where Shatzer was incarcerated on an unrelated offense involving sexual abuse of a different child. Shatzer waived his Miranda rights, but after Detective Blankenship explained what he wanted to discuss, Shatzer invoked his Miranda rights and refused to talk without an attorney being present. At that point, the interview terminated. The police closed the investigation in 2003. In February 2006, the same social worker filed a new referral when the child, now older, was able to make more specific allegations. Sergeant Kifer of the Hagerstown police Department then opened a new investigation. He assigned Detective Paul Hoover to the new investigation because Detective Blankenship was on leave. Shatzer had remained incarcerated since the interview in 2003, and was now imprisoned at the Roxbury Institute. Detective Hoover interviewed him there on March 2, 2006. Detective Hoover advised Shatzer of his Miranda rights and Shatzer signed the waiver form, waiving his right to an attorney and his right to remain silent. At no time did Shatzer indicate that he wished to talk with an attorney. Shatzer denied the fellatio allegation but did admit to masturbating in front of his son, from a distance of about three feet away. At the end of the half-hour interview, Shatzer agreed to undergo a polygraph examination. On March 7, 2006, Shatzer was again informed of and waived his Miranda rights, and the polygraph was administered. The examiner concluded that Shatzer failed the test. When informed of this fact by Detective Hoover, Shatzer became emotional, started to cry, and said "I didn't force him. I didn't force him." At that time he requested an attorney and the interview stopped.

Shatzer was charged with the offenses of second degree sexual offense, sexual child abuse, second degree assault, and contributing to conditions rendering a child in need of assistance. He filed a motion to suppress the two statements taken by the police on March 2 and March 7, 2006. He did so on grounds that his prior request for counsel in the 2003 interrogation prevented further interrogation without the presence of an attorney. The circuit court denied the motion on grounds that the length of time Shatzer was continuously incarcerated in the Division of Correction constituted a break in custody that negated any prohibition on re-interrogation after Shatzer's invocation of his right to counsel. After being found guilty, Shatzer appealed.

The Maryland Court of Appeals reversed the conviction. It did so on the grounds that: (1) there is no "passage of time" exception to the rule announced by the Supreme Court in *Edwards v. Arizona* (1981) that a suspect who expresses a desire to have counsel cannot be subject to further interrogation until counsel has been made available to him or her, unless the accused initiates further communication; and, (2) similarly, there is no "break in custody" exception to the *Edwards* rule. As to the passage of time issue, our Court of Appeals said that it was up to the Supreme Court to explain whether the rule it announced in *Edwards* may expire with the passage of time. Specifically, the court said that, in light of the Supreme Court's inability to rule on the question, "we hold that the passage of time alone is insufficient to expire the protections afforded by *Edwards*." As to the break in custody issue, the Court of Appeals declined to consider the broad question of whether a break in custody negated the protections in *Edwards*. The court further said that, even if a "break in custody" exception existed, the only event to support a break in custody in this case was Shatzer's release back into the general prison population between the two police interrogations. In the court's view, a suspect who remains in continuous government custody or incarceration remains in custody for *Edwards* purposes, particularly where the second interrogation regards the same underlying crime as the first interrogation. Otherwise, according to the court's thinking, there would be no "incentive to deter police from using release back into general prison population and subsequent re-interrogation of an inmate who had previously requested counsel, rather than honoring his request."

**NOTE:** The implications of the holding in *Shatzer* are clear. In the words of the dissenting judges, "**all law enforcement officers from every jurisdiction and agency will be held strictly liable for failure to discover that a suspect previously had invoked the Fifth Amendment right to counsel in connection with any outstanding criminal investigation. Any suspect who invokes such a right is forever unquestionable.**" The *Shatzer* opinion will discourage police from investigating new leads to older crimes if a suspect in those crimes already is incarcerated for other crimes. As the dissenters said, "[t]he police would be better off to wait for the suspect's release, thus ensuring a break in custody, and then interrogate the suspect. Of course, depending on the length of the sentence . . . this delay guarantees that memories will fade, evidence will be lost, and other witnesses will move away or die." Based upon the extreme implications of this case, expect the Supreme Court to exercise its power of review over the next year.

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